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INJUNCTIVE RELIEF AND PERSONAL INTEGRITY†

ROBERT ALLEN SEDLER*

THE NATURE OF THE PROBLEM

The law must deal with a variety of human experiences and needs. Potentially its grasp may reach to all facets of human existence. Much of its protection is tacit and taken for granted. The assurance of legal protection for violation of certain interests is one of the criteria of a civilized society and makes day-to-day living possible. But when there is the need for overt legal protection, the weaknesses of the legal process become evident. There are limitations on the power of society through a judicial tribunal to compel certain types of conduct. Further deficiencies appear in the process as it is administered. Nowhere are these points demonstrated more saliently than in the area of protection of personal interests.

When people cannot satisfactorily adjust personal relationships, their resort to the legal processes must be accompanied by an awareness that the law cannot be a substitute for a properly functioning inter-relationship with others. This is because the device the law is most capable of employing to protect interests is the awarding of a sum of money. From the earliest order for the payment of "weregild" to the present judgment for damages, Anglo-Saxon law, in its development as contrasted with that of the Roman law, has placed great emphasis upon appeasement through the payment of money. The genesis of the law of intentional torts was the necessity to appease injured dignity. Thus, substantial sums of money were awarded for things such as an assault or a slight battery to "buy off" the insulted party and insure that he would not "satisfy his honor" beyond the legal processes.¹

As law evolves from the "strict stage,"² it becomes recognized that a different function may be served. It is recognized that money may not be an adequate remedy for the interference with certain interests. Our legal system is complicated by the fact that most of the protection afforded by means other than the payment of money was originally administered by a separate court.³ This development in the "stage of

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1. For an excellent discussion of the historical relationship between tort and criminal law, see Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819 (1924).

2. POUND, *THE SPIRIT OF THE COMMON LAW* 140 (1921).

3. For a discussion of some of the undesirable complications in the remedies area see Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639 (1962). See particularly the discussion of conditional relief in actions historically denominated as "legal" at 711-15.

liberalization"⁴ had an inhibiting effect on the proper protection of personal interests by way of specific relief, which has not been fully eliminated in the "stage of maturity."⁵

What happened was simply that the "equity court," which granted most of the specific relief our law recognized,⁶ took the position that "equity protects only property rights."⁷ Hence, specific relief was not available to protect a personal interest unless the particular personal interest could be assimilated with a property one. Since the concept of a property right, however, did not have an economic meaning, it was not difficult for the courts to treat certain personal interests such as the privacy of one's letters as a property right.⁸ On the other hand, more substantial personal interests, such as a man's reputation, were refused protection because they did not involve a property right.⁹

The commentators bent their energies to proving that "equity could protect personal rights." Dean Pound's classic article¹⁰ develops the point at great length. Although he discussed to some extent the soundness of injunctive relief in particular situations, the main emphasis was on the necessity for the courts to abandon this artificial distinction and cease "proceeding upon fictions and technical bases of jurisdiction." Another writer went to great length to show that equity really had the power to protect personal rights and that the cases denying relief because of the absence of a property right could be explained on other grounds.¹¹

This is now all passé. This is not to say that vestiges do not survive, nor that in some instances the court will not consider personal interests sufficient to be protected while they will consider similar economic interests entitled to such protection. With the merger of law and equity becoming more and more a reality despite some undesirable relics,¹² the question is now what personal interests will be protected by way of

4. POUND, *supra* note 2, at 141.

5. *Id.* at 142.

6. The law courts granted only replevin and ejectment and at a later stage of development the "extraordinary legal remedies" such as mandamus, prohibition, and quo warranto.

7. See *Gee v. Pritchard*, 2 Swanton (Chan.) 402 (1818).

8. *Ibid.*

9. See *Brandreth v. Lance*, 8 Paige (N.Y. Chan.) 24 (1839). After *Prudential Assurance Co. v. Knott*, Law Reports, 10 Chan. App. 142 (1875), this apparently represented the common law of England, in effect overruling or severely restricting the holding in *Dixon v. Holden*, Law Reports, 7 Eq. Cases 488 (1869). The English practice has been changed by statute. See the discussion in CHAFEE AND RE, *EQUITY* 1133 n.27 (1958).

10. Pound, *Equitable Relief against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

11. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115 (1923). Some of the grounds of explanation seem most specious. The concept of "equity jurisdiction" has no place in a merged system except as regards the trial by jury guarantee. Some of the other articles dealing with the subject are Walsh, *Equitable Protection of Personal Rights*, 7 N.Y.U.L.Q. 878 (1930); de Funiak, *Equitable Protection of Personal or Individual Rights*, 36 KY. L.J. 7 (1947); Bennett, *Injunctive Protection of Personal Interests—A Factual Approach*, 1 LA. L. REV. 665 (1939); Moreland, *Injunctive Control of Family Relations*, 18 KY. L.J. 207 (1930); Moscovitz, *Civil Liberties and Injunctive Protection*, 39 ILL. L. REV. 144 (1944).

12. See *supra* note 3.

injunction and under what circumstances, rather than whether "equity has jurisdiction to protect personal rights." Some courts have long recognized that this was the question. In *Stark v. Hamilton*,¹³ for example, the court ordered the defendant to cease living with the plaintiff's minor daughter and observed:

It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages . . . but the latter is irreparable.¹⁴

In *Itzkovitch v. Whitaker*,¹⁵ the court enjoined the police from placing the photo of an arrested person in a rogues gallery prior to conviction, stating that "[a] personal grievance constitutes ground for an interference of equity. Individual rights may be protected in a Court of Equity and the officers can be restrained by injunction."¹⁶ And in *Hawks v. Yancey*,¹⁷ the court enjoined a rejected suitor from harassing his former mistress. It held that any limitation on the power of "equity" to protect personal rights was removed by statute and that the court was not constrained to search for a property right before granting relief. It noted that "The personal rights of citizens are infinitely more sacred and are of more value than things that are measured by dollars and cents."¹⁸

In succeeding years a number of courts have expressly repudiated any notion that the court must search for a "property right" before it can award injunctive relief. In *Kenyon v. City of Chicopee*,¹⁹ the court held that the constitutional interference with religious liberty and free expression by government officials could be enjoined following the lead of the United States Supreme Court, which held in *Hague v. C.I.O.*,²⁰ that the federal courts could enjoin unconstitutional action violating personal rights. The court succinctly stated the modern approach:

We believe the true rule to be that equity²¹ will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate;²² and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute.²³

13. 149 Ga. 227, 99 S.E. 861 (1919).

14. 99 S.E. at 862.

15. 117 La. 708, 42 So. 228 (1906).

16. 42 So. at 229, quoting secondhand from *People v. Board*, 55 N.Y. 390 (1874).

17. 265 S.W. 233 (Tex. Civ. App. 1924).

18. 265 S.W. at 237.

19. 320 Mass. 528, 70 N.E.2d 241 (1946).

20. 307 U.S. 496 (1939).

21. It would be better if this term were not used. The court—which under a merged system has succeeded to the powers of both the former law and equity courts—can protect these as all other rights.

22. Damages or other remedies such as defense to criminal prosecution.

23. 70 N.E.2d at 244.

This approach has also been explicitly adopted in decisions by the highest courts of Alabama,²⁴ California,²⁵ the District of Columbia²⁶ and Pennsylvania.²⁷ Nor is there any recent case where the highest state court has explicitly adhered to the distinction. We may accept the fact that it is doubtful today if too many courts look to find a technical property right.

Let us then review the modern approach. First, the conduct of the defendant must constitute a substantive wrong.²⁸ For example, if the conduct of the defendant does not constitute an invasion of privacy that is recognized in the particular jurisdiction, there can be no question of any relief. It may be asked in how many of the cases where injunctive relief was refused on the ground that "equity protects only property rights," there was no substantive right at all. Secondly, the plaintiff must be entitled to injunctive relief. The particular interest must be of such a type that the power to grant such relief with its severe sanctions for non-compliance and the increased amount of judicial supervision that such relief entails, should be employed. Moreover, he must show that damages and other remedies are inadequate, just as must any plaintiff seeking injunctive relief. Finally, he must show that it is practicable to order injunctive relief. The court must consider the feasibility of enforcement and other similar factors.²⁹ And, of course, the traditional defenses such as improper conduct or laches or the public interest are available to the defendant.

One writer³⁰ has suggested that the "property right" theory is desirable, since in the cases where the courts want to deny relief, they can say, "Relief denied because of the absence of a property right," and where they want to grant relief, they can find a technical property right.³¹ Admittedly, courts have been doing this to a great extent.³² He also observes that, "The property requirement has not operated to obstruct justice."³³ As the discussion will demonstrate, this simply is not borne out. Moreover, this writer has never been able to see the utility of the courts' saying one thing and doing another. Where the interest is not of a sufficient nature to be entitled to any protection or to injunctive protection, the court can so state. Where it is impractical to grant specific relief, the courts can say this just as they do in other cases.³⁴ Honesty of judicial verbalization will furnish a more accurate

24. *Knighon v. Knighon*, 252 Ala. 520, 41 So. 2d 172 (1949).

25. *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 180 P.2d 321 (1947).

26. *Berrien v. Pollitzer*, 165 F.2d 21 (D.C. Cir. 1947).

27. *Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955).

28. See the discussion of this in *Bennett*, *supra* note 11, at 669, and *Moscovitz*, *supra* note 11, at 146.

29. See the discussion *ibid.*

30. *Bennett*, *supra* note 11, at 668.

31. *Ibid.*

32. See the discussion in *Pound*, *supra* note 10, at 678; *de Funiak*, *supra* note 11, at 9.

33. *Bennett*, *supra* note 11, at 668.

34. Courts will not specifically enforce contracts that are too indefinite to form the basis of a practicable decree. *Gulbenkian v. Gulbenkian*, 147 F.2d 173 (2d Cir. 1945). Nor will they enforce certain contracts requiring continuous supervision. *Marble Co. v.*

guide to lawyers and lower court judges than judicial "caginess." The approach adopted by the courts in the more modern cases treats injunctive relief as subject to the same considerations whether the nature of the interest sought to be protected is "true property," "fictional property," or outright personal. By this attitude we can preserve the desirable results of the older cases while eliminating the undesirable ones. Once we fully abandon the "personal-property" dichotomy, we will spend less psychic energy trying to find a charismatic interest and decide whether under the circumstances injunctive protection should be afforded to a real interest. The courts are moving rapidly in this direction, which is a hallmark of the maturity stage of legal development.

Our concern then is with the availability of injunctive relief to protect personal integrity. We have broadly classified the interests we will discuss into five categories: (1) The right to reputation; (2) The right to be let alone; (3) The right to family relations; (4) The right to associational relations; and (5) Civil Rights. We will ordinarily not discuss whether the interest is recognized as a matter of substantive law, though in some instances where the only type of protection that can be afforded is by injunctive relief, we will discuss the substantive nature of that interest. Our concern will be primarily with invasions by private persons, though in some circumstances we will discuss invasions by government officials. A strong concern, as the discussion will indicate, will be with the practicability of granting injunctive relief and other countervailing policies which may make the granting of such relief to protect personal instances unwise. This emphasis should in no wise lessen what is considered to be the main thrust of this writing—that whenever feasible, injunctive relief should be available to protect personal integrity.

THE RIGHT TO GOOD REPUTATION

It is the classic view that publication of matters injuring the personal reputation of the plaintiff will not be enjoined, even though admittedly damages are inadequate due to their highly speculative nature where injury to reputation is involved. The earliest case in this country involving the question was *Brandreth v. Lance*.³⁵ There the complaint alleged that the defendant, a former employee of the plaintiff, was planning to publish a book about the plaintiff, libelling him. The court held that the complaint alleged no injury to property rights and therefore, "equity had no jurisdiction." The court further observed that it could not "assume jurisdiction" without infringing upon the liberty of the press. Since today it is clear that the court can protect

Ripley, 77 U.S. 339 (1870); *Edelen v. W. B. Samuels & Co.*, 126 Ky. 295, 103 S.W. 360 (1907); cf. *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*, 253 Pa. 457, 98 Atl. 652 (1916). There is no need to obfuscate the reason why injunctive relief is refused when the real reason is that it is impracticable to grant it.

35. *Supra* note 9.

personal rights by way of injunction, that much of the case is no longer sound. But what of the second ground? Would an injunction against the publication of a libel be unconstitutional as a prior restraint on free expression? Again the answer is clear today: an injunction against publication is not necessarily unconstitutional as a prior restraint, though it may be in a particular case. The Blackstonian view that liberty of the press means "the absence of restraints upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter, when published,"³⁶ has never been accepted in this country. Although it is recognized that the guarantee of free expression does not prevent civil actions for damages due to libel,³⁷ it is equally well-settled that governmental action may be unconstitutional as a restraint on expression even when the action takes place *subsequent* to publication.³⁸

So too, a prior restraint on publication is *not necessarily unconstitutional*, though with a subsequent restraint, it may be. The Court would be more likely to find a prior restraint unconstitutional, since in that situation the expression is never heard. This was emphasized by the Supreme Court in *Near v. Minnesota*,³⁹ where it declared unconstitutional a Minnesota statute authorizing the courts to enjoin future publication of newspapers on the ground that past issues had been libelous. It is interesting to note that in that case the Court observed it was not concerned with "questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."⁴⁰ However, the Court has upheld injunctions against boycotts, even though they consisted of publishing statements that people should not use the plaintiff's products.⁴¹ It has upheld injunctions against illegal picketing,⁴² even though picketing comes within the guarantee of free expression.⁴³ Courts, both state and federal, have long enjoined dispar-

36. IV BLACKSTONE, COMMENTARIES 152 (Tucker ed. 1803).

37. Justice Black has stated that he is of the opinion that the first amendment bars such actions. See Black, *A Public Interview*, 37 N.Y.U.L. REV. 549, 557 (1962).

38. This was recognized as early as *Schenck v. United States*, 249 U.S. 47 (1919). For a case holding criminal punishment unconstitutional see *De Jonge v. Oregon*, 299 U.S. 353 (1937). As applied to contempt of court proceedings see *Craig v. Harney*, 331 U.S. 367 (1947).

39. 283 U.S. 697 (1931).

40. 283 U.S. at 716.

41. See *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418 (1911). The Court observed that:

But we will not enter upon a discussion of the constitutional question raised for the general provisions of the injunction did not in terms restrain any form of publication. The defendant's attack on this part of the injunction raises no question as to an abridgement of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which by words and signals, printed or spoken, caused or threatened irreparable damage. 221 U.S. at 436.

The Court referred to the conduct as constituting "verbal acts."

42. See, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957).

43. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941).

agement of property, even though the restraint on free expression is the same as is involved in an injunction against personal defamation.⁴⁴ Finally, in *Kingsley Books, Inc. v. Brown*,⁴⁵ the Court held that the state could constitutionally enjoin the publication of obscene works, since they did not come within the protection of the first and fourteenth amendments.

No suggestion is made here that defamation does not come within the protection of the guarantee of free expression.⁴⁶ It is earnestly submitted that it does. All that is contended is that it is not necessarily unconstitutional to issue an injunction against expression in a particular case. As the Court observed in *Kingsley Books v. Brown*, "The phrase, 'prior restraint,' is not a self-wielding sword. Nor can it serve as a talismanic test."⁴⁷ Since the courts have found nothing inherently unconstitutional about issuing injunctions against other forms of expression, so too there is nothing inherently unconstitutional about issuing an injunction against defamation.⁴⁸

However, there is a common law policy in favor of free expression. Even though it might not be unconstitutional to issue an injunction against a particular piece of defamation, nonetheless, the court should hesitate before imposing a prior restraint upon defamation. As will be shown, the courts have now become more reluctant to issue injunctions against disparagement. We will approach the problem in terms of common-law policy rather than in terms of constitutionality, though it will be indicated where an injunction against defamation is thought to be unconstitutional. Absent such a situation we will assume that the granting of an injunction in the particular case would be constitutional.

At this juncture a word should be said about Fox's Libel Act,⁴⁹ which guaranteed that the jury could determine the truth or falsity of the publication. In at least one state, Missouri, Fox's Libel Act has been used to justify the refusal to issue an injunction against personal defamation.⁵⁰ Dean Pound has demonstrated that the purpose of the Act was to leave the question of libel to the jury, since judges were often deciding the question as a matter of law when there could be

44. See the discussion *infra*, notes 66-72 and accompanying text.

45. 354 U.S. 436 (1959).

46. But note that in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the Court held that "race libel" did not come within the protection of the first amendment. The result is questionable, and it is submitted that the case will not be extended.

47. 354 U.S. at 441.

48. See also the discussion in Pound, *supra* note 10, at 655, and Walsh, *supra* note 11, at 883, to the effect that an injunction against personal defamation would not necessarily be unconstitutional.

49. 52 Geo. 111, ch. 60 (1792).

50. *Ryan v. City of Warrensburg*, 342 Mo. 761, 117 S.W.2d 303 (1938); *Wolf v. Harris*, 267 Mo. 405, 184 S.W. 1139 (1916). But Fox's Libel Act is not a bar to an injunction against verbal acts designed to interfere with advantageous relationships, such as inducing the plaintiff's customers to breach their contracts with him. *Downey v. United Weatherproofing Co.*, 363 Mo. 852, 253 S.W.2d 976 (1953). In view of this holding earlier cases holding that Fox's Libel Act was a bar to an injunction against slander of title, *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S.W. 804 (1892), or against an illegal boycott, *Marx & Hass Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S.W. 391 (1902), can be deemed overruled.

serious dispute as to whether the publication constituted a libel. This was also the practice of many judges as to the issue of truth.⁵¹ He points out that the injunction should only be granted when it is clear that the publication is libelous and when it is clear that it is untrue. In such a situation he observes that the jury trial is a "mere form" and "is no more an obstacle than in the case of equity jurisdiction to enjoin trespass, disturbance of easements or nuisance."⁵² In other words, the evil sought to be remedied by Fox's Libel Act is not present when there is no disputed question of fact on which the jury should pass. I would agree that the injunction should never be issued absent clear evidence that the publication is libelous and untrue. In any event, if the state constitution is interpreted as requiring a jury trial, the court can summon a jury to pass on these questions. Since we are no longer concerned with questions of "equity jurisdiction," the fact that the plaintiff seeks injunctive relief would not prevent the court's summoning a jury in a proper case.⁵³ Therefore, Fox's Libel Act should have no effect on the power of a court to grant injunctive relief against defamation.

Let us now review the circumstances in which the courts will enjoin publication. The cases fall into two classes, those involving "verbal acts" and those involving disparagement of property.⁵⁴ As to "verbal acts" often the publication will not even be defamatory or untrue. One situation is the employment of an illegal boycott where the defendant publishes statements that the public should not use the plaintiff's product.⁵⁵ Another involves attempts to induce breaches of contracts that third parties have with the plaintiff.⁵⁶ In *Downey v. United Weatherproofing Co.*,⁵⁷ it was contended before the Missouri Supreme Court, that an injunction could not be issued against such conduct. Some of the statements were admittedly defamatory. The court observed that mere loss of business due to defamatory statements about the plaintiff would not be sufficient to justify an injunction. The court went on to say that the constitutional provisions relating to the jury trial guarantee prevented the granting of injunctive relief unless some ground *other than defamation* would make the defendant's conduct wrongful. Here the court found that the plaintiff was trying to prevent interference with his business and contractual interests. Thus, the defendant was committing *another wrong* by verbal means, which would be enjoined.

The distinction seems specious. In either event publication is being restrained. The inhibiting effect on expression is analytically the same

51. See the discussion in Pound, *supra* note 10, at 655-57.

52. *Id.* at 657.

53. Even in ancient equity the chancellor had a power to call an advisory jury.

54. Our use of the word, "disparagement," includes both slander of title (the claim that the plaintiff does not have legal title to the property he is representing as his) and trade libel (the claim that the plaintiff's product is not of the quality he represents).

55. See, e.g., *Gompers v. Bucks Stove and Range Co.*, *supra* note 41. The Court found that a union was subject to the provisions of the Sherman Act, which interpretation was superseded by the Clayton Act.

56. Often the defendant is a business competitor, but this is not a requisite to the tort.

57. *Supra* note 50.

irrespective of the nature of the injury to the plaintiff. What the court must be concluding is that the interest in personal reputation is not entitled to injunctive protection while the interest in carrying on one's business and contractual activities is. If this is the basis of the court's decision and represents its evaluation of competing interests, that is one thing. But it is difficult to see how the question can be resolved in terms of the applicability of the constitutional guarantee.

Another type of verbal act that is enjoined is one involving unfair competition. False statements about a competitor's product so that the defendant can sell his own are enjoined.⁵⁸ So too are false statements about the plaintiff's operation designed to drive him out of business and give the defendant an illegal monopoly.⁵⁹ And in the picketing area injunctions have been granted against picketing—which admittedly involves more than expression⁶⁰—designed to induce businessmen to unlawfully breach contracts,⁶¹ designed to cause an employer to hire on the basis of race, an illegal practice under state law,⁶² and to commit an unfair labor practice.⁶³ And in *Magill Bros. v. B'ldg Service Employees Int'l Union*,⁶⁴ the court enjoined the pickets from the use of false and defamatory statements in their picketing. The court found that untruthful picketing was unlawful picketing. Observing that picketing involves more than expression, the court concluded it was not enjoining the utterance of false statements, but unlawful picketing.

Without necessarily approving of the results in all of these cases,⁶⁵ it is contended that these cases recognize the power of the court to enjoin publication consistent with the constitutional guarantees and the common law policy favoring free expression.⁶⁶ Even though the expression may be characterized as "verbal acts" and involves a tort other than defamation, the inhibiting effect on expression is the same. In an effort to avoid the rule, "Equity will not enjoin a libel," the courts have found the acts wrongful on other grounds. But the expression has, nonetheless, been enjoined, even in some instances where truthful, if it was found to be for an improper purpose. Again, the results are justifiable only if it is concluded that the interests involved in these cases are entitled to protection while personal reputation is not.

Nor have most courts hesitated to enjoin disparagement of property, even when no other tort such as unfair competition is present. Dissatis-

58. *Black & Yates v. Mahogany Association*, 129 F.2d 227 (3d Cir. 1941); *Bourjois, Inc. v. Park Drug Co.*, 82 F.2d 468 (8th Cir. 1936).

59. *Burke Trust Co. v. Queen City Coach Co.*, 228 N.C. 768, 47 S.E.2d 297 (1948).

60. People may well refuse to cross a picket line without considering the merits of the dispute.

61. *Giboney v. Empire Storage & Ice Co.*, *supra* note 42.

62. *Hughes v. Superior Court*, *supra* note 42.

63. *International Brotherhood of Teamsters v. Vogt, Inc.*, *supra* note 42.

64. 20 Cal. 2d 506, 127 P.2d 542 (1942).

65. See particularly the criticism of the *Magill* case, *infra* notes 96-100 and accompanying text.

66. See also *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where "fighting words," e.g., "God damned racketeer," were held not to be within the protection of the first amendment.

fied buyers of automobiles have been enjoined from "driving the automobile covered with signs saying it was "no good," tying lemons and other articles to it, placing a sign in the window that it had been bought from the plaintiff and exhibiting it in front of the seller's place of business,"⁶⁷ and from placing a "white elephant" sign on the vehicle.⁶⁸ The Texas courts, however, have refused to enjoin this type of conduct, saying that the expression is protected by the constitutional guarantee;⁶⁹ and an older Missouri case refused to enjoin slander of title to the plaintiff's patent.⁷⁰ The authority of this case is doubtful in view of the holding in *Downey*, particularly since the court stated there that it was immaterial that unfair competition was involved. A later case from the same jurisdiction in an intermediate appellate court held that a former employee could be enjoined from contacting the plaintiff's customers, telling them that the plaintiff overcharged and that the work was of inferior quality.⁷¹ This was held to be an interference with his business and contractual relationships, rendering the constitutional guarantee inapplicable.

An interesting case of disparagement was *Lawrence Trust Co. v. Sun-American Pub. Co.*,⁷² where the defendant published an article about the trust company stating that it was run by incompetent officials. The allegation was that the article was defamatory and calculated to persuade the public not to patronize the plaintiff's business. The court held that the attacks on the abilities and characters of the officers reflected on the quality of the business and thus could be enjoined.⁷³ But where the individual had only his services to sell, attacks on him have not been enjoined. Defamatory attacks on attorneys⁷⁴ and physicians⁷⁵ have been held not subject to the injunctive process, since only personal reputation was involved.

Again, where the court enjoins disparagement, it is enjoining expression. Since it is now recognized that injunctive relief is available to protect personal rights as well as property rights,⁷⁶ the injunctions

67. *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436 (1937).

68. *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So. 2d 383 (1943). See also *Saxon Motor Sales v. Torino*, 166 Misc. 863, 2 N.Y.S.2d 885 (1938).

69. *Lawrence v. Atwood*, 295 S.W.2d 298 (Tex. Civ. App. 1956); *McMorries v. Hudson Sales Corp.*, 233 S.W.2d 938 (Tex. Civ. App. 1950).

70. *Flint v. Hutchinson Smoke Burner Co.*, *supra* note 50.

71. *May Furnace Co. v. Conaway*, 352 S.W.2d 40 (Mo. App. 1961). See also the discussion in note 50 *supra*.

72. 245 Mass. 262, 139 N.E. 655 (1923).

73. A contrary approach was taken by the English court in *Prudential Assurance Co. v. Knott*, *supra* note 9, where a pamphlet charged that the plaintiff's insurance company was poorly run. The court held that "equity had no jurisdiction to restrain the publication of a libel." This is not the approach taken in England today. See the discussion in note 9 *supra*. Now the test is simply whether damages and other remedies are inadequate and whether the granting of specific relief will be practicable or will run counter to other strong policies.

74. *Garipey v. Springer*, 318 Ill. App. 523, 48 N.E.2d 572 (1943); *Kwass v. Kersey*, 139 W. Va. 497, 81 S.E.2d 237 (1954). See the discussion, *infra* notes 104-06 and accompanying text.

75. *Wolf v. Harris*, 267 Mo. 405, 184 S.W. 1139 (1916). See the discussion, *infra* notes 104-06 and accompanying text.

76. It is impossible to draw the distinction between personal and property interests

should be granted against defamation to the same extent that they are granted against disparagement and verbal acts. The hesitation that the court may feel about granting an injunction against defamation—the fear that there will be too great a restraint on expression if injunctions are granted against personal expression—is unwarranted, as this restraint can be avoided by following the practice that is now apparently followed in the disparagement cases. *The court is not required to enjoin every act of personal defamation just as it does not enjoin every act of disparagement. The principle is well established that the court will not enjoin a disparagement when it is not in the public interest to do so. In other words, the defense of public interest is available to justify the refusal of an injunction against disparagement just as it is in the case of all injunctive relief.*⁷⁷

The leading case demonstrating this point is *Krebiozen Research Foundation v. Beacon Press*.⁷⁸ The plaintiffs were a non-profit corporation which sponsored cancer research, a doctor and medical school instructor who was the scientific advisor of the foundation, the inventor of the drug, and a drug company owning the manufacturing rights to the drug. They had developed a drug, Krebiozen, which they contended might be a cure for cancer. It was still in the experimental stage. The defendant was a book publisher, who according to the complaint was about to publish a book containing “false, fraudulent, wrongful, malicious and erroneous statements which tend to destroy the good name and professional reputation of the plaintiffs and the commercial value of the drug, Krebiozen.” The court assumed that this constituted disparagement and based on previous cases concluded that it had the power to issue an injunction against publication.

But it held that the power would not be exercised in this case, because the public interest in the discussion of the subject of cancer and the constitutional protection of a free press were entitled to greater protection than the plaintiff's interest in the commercial value of the drug. It concluded that both the common law policy in favor of free expression—here, the public interest in the discussion of cancer cures—and the constitutional guarantee of free expression precluded the granting of an injunction. It stated as follows:

The establishment of the truth about Krebiozen as soon as possible is critically important to the public. If it is a cure it will be one of the great discoveries of modern times; if it is of value in some cases only the limitations are important; if it is of no value lives may be saved and suffering avoided by the establishment of the fact. . . . It is axiomatic in our society that full information and free discussion are important in

where one's professional reputation is involved. As the prevalence of character and fitness committees indicate, undesirable personal qualities may render it impossible for a person to practice his desired profession.

77. The concept of public interest is present throughout the area of specific relief. This is particularly so as regards the refusal of injunctions against nuisances upon a balancing of the relative hardships.

78. 334 Mass. 86, 134 N.E.2d 1, cert. denied, 352 U.S. 848 (1956).

the search for wise decisions and best courses of action. In a particular case, to be sure, new discovery may be impeded by a false and unjust attack. . . . We grant that it could conceivably be here, as claimed, that this attack which the demurrer admits for present purposes to be false and defamatory will impede progress in the testing of Krebiozen. But basing a rule on that possibility would end or at least effectively emasculate discussion in the very controversial fields where it is most important.⁷⁹

The approach taken by the court is sound and demonstrates proper regard for both the interests in property and reputation and the greater and more important societal interest in free expression. An injunction against the discussion of a matter of such public concern would clearly be unconstitutional and in violation of our policy of free expression.

But every case does not involve matters of such public concern. We recognize that the public interest in hearing that X Co.'s automobile is a "lemon" is entitled to less weight than X Co.'s right to carry on its business unhampered by untrue statements about the quality of its products. So too, can it be said that the public's interest in hearing about, say, the private life of an individual who is not a public figure, is entitled to more weight than that individual's right to carry on his life's activities unhampered by untrue statements about his character? The emphasis should not be on the defendant's right to publish, but on society's right to know. The defendant's right to publish for his own satisfaction is entitled to no greater protection than the plaintiff's right to a good reputation. We recognize this principle by allowing actions for damages when the defendant has committed defamation. We protect the public's right to know by denying injunctive relief and permitting the publication to be made. The rationale fails, however, when the public interest in hearing what the defendant has to say is slight. Does the public have a real interest in hearing purely private defamation? We say that it does not when there is disparagement of ordinary property. But when the property is a cancer cure as in *Krebiozen*, or patent medicine that the defendant is attempting to expose as a worthless nostrum, as in *Willis v. O'Connell*,⁸⁰ the court immediately recognizes the paramountcy of the public interest in free discussion. The court need not fear that it must enjoin *all* personal defamation if it enjoins some any more than it must enjoin the discussion of cancer research if it enjoins placing "lemon" signs on an automobile.

Consider a case such as *Kivett v. Nivels*,⁸¹ where the allegation was that the defendant was exhibiting a forged letter in which plaintiff was to have admitted having illicit sexual relations with a fifteen-year-old girl. Plaintiff was not a public figure, and the public interest in his

79. 134 N.E.2d at 7.

80. 231 Fed. 1004 (S.D. Ala. 1916). See also *Marlin Firearms Co. v. Shields*, 171 N.W. 384, 64 N.E. 163 (1902), where the court concluded that the public interest in hearing about the quality of rifles from a magazine specializing in reporting about them outweighed the interest of the manufacturer in preserving the reputation of his rifles.

81. 190 Tenn. 12, 227 S.W.2d 39 (1950).

sexual relations was certainly no more than its interest in whether a car was a "lemon." The court's granting an injunction to protect the plaintiff's personal reputation in that case, as it protected the automobile's commercial reputation in the other cases, would not mean that it would have to issue an injunction in a case such as *Howell v. Bee Publishing Co.*,⁸² where the public interest in hearing what the defendant had to say, even if defamatory and untrue, clearly outweighed the plaintiff's interest in his good reputation. There the plaintiff was a candidate for governor of the state. The defendant newspaper allegedly published false statements about him. The court very properly held that it would be unconstitutional to enjoin such publications. The public must hear all information about candidates for public office. Since this is so, the court cannot take the risk that it is wrong in finding the publication defamatory, with the result that the public will be deprived of information it can consider in deciding which candidate it will support.⁸³ The court observed that it would not enjoin the publishing of "political matter." The enjoining of personal matter is on an entirely different footing.

All that is suggested is that the test for injunctions against personal defamation be the same as that for injunctions against disparagement of property. *Where the public interest in hearing the communication is outweighed by the plaintiff's interest in preserving the integrity of his reputation, the court should enjoin the publication of defamatory and untrue statements.* It is the public interest in hearing the communication rather than the defendant's interest in expressing it that must be considered. It should be noted that all the privileges to the publishing of defamation, absolute and conditional, are still applicable. It is only when the communication is defamatory, untrue, unprivileged and of no real interest to the public that an injunction would be proper. There will be no real inhibition on the process of free discussion. As the Restatement has observed, "The public interest in freedom of speech is degraded when it is used as a shield for tortious harms caused by statements of a wholly private significance."⁸⁴ Enjoining of personal libels in England⁸⁵ has not had any adverse effect on expression; nor has the enjoining of disparagement in this country once it is recognized that an injunction will be refused when the public interest in hearing the communication outweighs the plaintiff's interest

82. 100 Neb. 39, 158 N.W. 358 (1916).

83. In the 1962 elections the lower courts in California issued a spate of injunctions against the dissemination of certain campaign literature allegedly defamatory. See *New York Times*, October 31, 1962, p. 1. Naturally there was no time for appeal. The actions of these courts were most improper and deprived the public of an opportunity to have information about the candidates. The holdings were clearly erroneous and would have been reversed by the appellate courts.

84. RESTATEMENT, TORTS § 942, comment d (1939). The Restatement takes the position taken here, that the policy favoring free expression is to promote the discussion of matters of public interest and does not come into play when matters of purely private significance are involved. It notes that the frontiers of public interest are constantly expanding and admonishes against the too frequent issuance of injunctions against writing.

85. See the discussion of the English practice in Pound, *supra* note 10, at 665-66.

in preserving the commercial reputation of his property. So too, enjoining personal defamation will have no adverse effect, since the only instances in which the injunction will be granted are those where the public interest in hearing the subject matter of the communication is not involved.

Our concept of free expression recognizes that there are varying qualities to such expression. Obscenity—as defined by the Supreme Court and not as erroneously applied by many state and lower federal courts—is deemed to have no social utility,⁸⁶ nor are “fighting words,”⁸⁷ nor race libel.⁸⁸ Handbills of a commercial nature are not entitled to the same protection as those disseminating religious ideas. Thus, the state can apply its anti-littering laws to the former,⁸⁹ but not to the latter.⁹⁰ The public's interest in knowing where certain goods can be bought is outweighed by the government's in maintaining clean streets; but its interest in hearing about religious views is not. This is not to be taken as approval of the “balancing process” when applied to justify governmental action restricting the spread of political ideas and actions. Here the author is in accord with the absolutist view. But where personal defamation of individuals whose affairs are not a matter of public concern is involved, it is submitted that a balancing of the public interest in hearing the expression against the individual's interest in preserving his reputation is proper. The court should protect a man's personal reputation no less than it protects the reputation of the products he sells. The court's hesitancy to issue injunctions against personal defamation, it is felt, arises out of a fear of inhibiting public discussion. This fear should not prevent the granting of an injunction where the subject matter of the communication is not one for public discussion and involves matters in which the public has no interest.

Applying this test to the decided cases, I would conclude that the great majority of them were rightly decided. In these cases the granting of an injunction would have been improper and in some at least, unconstitutional because of the public interest in free discussion. What is objectionable are those cases where the courts blindly denied injunctive relief on the ground that personal reputation was involved, without considering whether there was any public interest in hearing the communication, or such slight interest that it is clearly outweighed by the plaintiff's interest in preserving his good reputation.

As stated previously, where the plaintiff was a candidate for public office, the injunction was properly denied.⁹¹ The public interest in knowing of his qualifications and defects outweighs any interest of his in preserving his reputation. Drawing an analogy to invasion of privacy,

86. *Roth v. United States*, 354 U.S. 476 (1957).

87. *Chaplinsky v. New Hampshire*, *supra* note 66. See also *Fox v. State of Washington*, 236 U.S. 273 (1915), involving advocacy of violation of law.

88. *Beauharnais v. Illinois*, *supra* note 46.

89. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

90. *Jamison v. Texas*, 318 U.S. 413 (1943).

91. See the discussion, *supra* notes 82-83 and accompanying text.

we may say that public personages should not have their reputations protected by injunctions. The public interest in knowing about the activities of these persons justifies the risk of injury to their reputations. Any injury to these reputations can only be compensated by damages, since by employing that method the public may receive the communication. This rationale justifies the result in a case such as *Kuhn v. Warner Bros.*⁹² The defendant was issuing a movie, "Confessions of a Nazi Spy," which dealt with the activities of the German-American Bund and its president. The public had a strong interest in knowing about these activities because of the effect their actions could have on American foreign and domestic policy. This justifies any injury to reputation that would result from a defamatory publication.

The public interest in learning the facts of a labor dispute has been properly held to justify the refusal of an injunction against allegedly untruthful statements by one of the parties. In *Montgomery Ward v. United Retail, Wholesale and Department Store Employees of America*,⁹³ the employer sought to restrain the union from publishing in their booklets "untrue, libelous and defamatory statements." The court held that the injunction could not be constitutionally issued. It observed that only in the case of trade libel or wrongful coercion would an injunction be issued. Much of the opinion was devoted to demonstrating why the acts of the defendants were not trade libel, and the analysis of the basic question is sketchy. But the result is sound. In a labor dispute both sides are appealing to the public for support. With the recent tendency of governmental officials to intervene in an attempt to mediate, public support for a position becomes highly significant. Also, the union must persuade its members and to an extent, other unions of the soundness of its position if the strike is to have adequate support. Therefore, the interest of the public and the recipients of the communications clearly outweigh the plaintiff's interest in preserving its reputation.

In *Ex parte Tucker*,⁹⁴ the court held unconstitutional an injunction against the union and its members prohibiting them from defaming any employees of the company during a strike. The same considerations which justify the risk to the employer's reputation justify that to the reputations of his non-striking employees. The facts of the labor dispute must be brought into the open even at the risk of injury to reputation.⁹⁵ With this in mind the result in *Magill Bros. v. B'ldg Service Employees Int'l Union*,⁹⁶ is very questionable. There the court

92. 29 F. Supp. 800 (S.D.N.Y. 1939).

93. 400 Ill. 38, 79 N.E.2d 46 (1948).

94. 110 Tex. 335, 220 S.W. 75 (1920). See also *Venturelli v. Trovery*, 346 Ill. App. 429, 105 N.E.2d 306 (1952), where the court refused to enjoin the union from listing the plaintiff's name in the "we do not patronize" section of its newspaper.

95. The same position was taken by the court in *Moore v. City Dry Cleaners*, 41 So. 2d 865 (Fla. 1949), where it enjoined a union from acts of violence in connection with a strike, but did not enjoin it from "advertising the strike," at the plaintiff's place of business.

96. *Supra* note 64.

enjoined pickets from the use of false or untruthful statements in their picketing. The court said that picketing is more than ordinary expression and that untruthful picketing was unlawful picketing. Since that portion of the picketing was unlawful, it could be enjoined. It concluded that the effect of the decree would be to protect the legitimate interests of both parties.

This neat syllogism overlooks the fact that the court is acting as censor over a matter in which it admits the public has a strong interest. The court is deciding that the matter is untrue instead of leaving this to be determined "in the arena of public opinion." The result is even more questionable, since the same court refused to enjoin personal defamation in a case where the public interest in the matter was doubtful.⁹⁷ And in a subsequent case where it issued an injunction against all picketing, it refused to enjoin efforts by the union to persuade other unions to refuse to handle the plaintiff's goods.⁹⁸ The court's obsession with picketing as something other than speech caused it to fall into the situation where it and not the public is the judge of the truth of a matter of public interest. While the result may be constitutional in view of the Supreme Court's attitude toward picketing,⁹⁹ nonetheless, it is undesirable. Where the public has an interest in the subject matter of the communication, the court should not decide what the public may hear, even though it finds that what the defendant is saying is untruthful.¹⁰⁰

Another situation in which the interest of a substantial number of persons in hearing what the defendant had to say justified the refusal of an injunction against defamation occurred in *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*.¹⁰¹ This involved a dispute between two factions each claiming to be entitled to the property of the religious organization. The court decided which group was the dominant one and hence, entitled to the property. But it refused to enjoin the dissatisfied members from issuing slanderous or libelous statements against the others. Such an injunction would be an infringement upon free expression. The court emphasized that a religious controversy was present. All members of the group had an interest in hearing statements about the leaders and members

97. See the discussion of the Bailey case, *infra* notes 107-08 and accompanying text.

98. *N.W. Pac. R. Co. v. Lumber & Sawmill Workers Association*, 31 Cal. 2d 441, 189 P.2d 277 (1948). The court enjoined violent picketing and the threatening of workers who did not go out on strike. But the injunction was modified so as not to prohibit peaceful persuasion. The emphasis was on the prior restraint involved.

99. It may be safely stated that only peaceful picketing for a purpose considered proper under state law may not be enjoined. The approach that untruthful picketing is unlawful may not commend itself to the Supreme Court, but this cannot be ascertained definitely in view of the Court's changed attitude toward picketing since *Thornhill*.

100. Compare the holding in *Milwaukee Electric Railway & Light Co. v. Pallange*, 205 Wis. 126, 236 N.W. 549 (1931), where the court refused to enjoin a newspaper from urging streetcar passengers not to pay higher fares, on the ground that the higher fare was illegal. It also urged the passengers to defy the motorman to eject them. The plaintiff alleged that violence would result, but the court held that the public interest in making its protest known was paramount.

101. 39 Cal. 2d 121, 245 P.2d 494 (1952), *cert. denied*, 345 U.S. 938 (1953).

of the victorious group. The number of persons that would have an interest in the communication made the matter one of "public interest" justifying the refusal of the injunction. As far as the members of the religion were concerned the plaintiffs were "public figures," and free discussion of their qualifications and characters could not be restrained.

A similar case is *Choate v. Logan*.¹⁰² There a commander of an American Legion post sought to restrain publication by the executive committee of a report censuring the plaintiff for a speech he made about the Legion. The injunction was denied, the court holding that the committee had a right to make a report on the conduct of the officers and members. The other members of the organization are interested in the conduct of their officers, and they should determine the truth or falsity of the statements rather than the courts. As discussed previously, the refusal of the injunction in the majority of the cases where it has been sought is sound and necessary to prevent the inhibition of free expression.

Our concern is with those cases where it is not. The clearest case in this category is *Kivett v. Nivels*,¹⁰³ which we have discussed previously. Here an individual alleged that he was being libelled by a forged letter in which he is to have admitted illicit sexual relations. No substantial segment of the public could legitimately be interested in his sexual activities. Note that there could be no question of enjoining the defendants from taking this to the police; there would be a qualified privilege to report matters such as this to law enforcement officers. But the plaintiff is entitled to have his reputation protected from attacks such as this that do not involve the public interest. The societal loss if the court errs in its determination as to the truth or accuracy of the statement is nil, as there is no public interest in the subject matter of the communication. Consequently, an injunction should have been issued here. The granting of it is no different than an injunction against the placing of the proverbial "lemon" on the automobile.

The next situation involves a clearer parallel to the disparagement cases. In some of those cases dissatisfied customers disparaged the quality of the plaintiff's merchandise. The majority of the courts before whom the question has come have enjoined such conduct. They have concluded that the public interest in hearing about the merchandise from a dissatisfied customer is not such that the publication should be permitted at the risk of injury to the product's reputation. The danger to free expression if the matter not published is true is deemed outweighed by the danger of injury to the product's

102. 240 Mass. 131, 133 N.E. 582 (1921).

103. *Supra* note 81. There the plaintiff brought a "bill quia timet" in order to get around the rule that "equity would not enjoin a libel." The procedural result is correct, since whether a court will grant specific relief should not depend on the label the plaintiff assigns to the form of specific relief he seeks.

reputation if the matter is published and is false, which the court finds it is. However, when the plaintiff does not sell a product, but sells himself, the courts have not extended this protection. In *Kwass v. Kersey*,¹⁰⁴ the plaintiff was an attorney who had drawn up a divorce settlement. The wife later became dissatisfied with the agreement, and her father circulated letters among friends and clients of the plaintiff accusing him of being a "shyster" and otherwise guilty of improper practices. The court refused to grant an injunction, emphasizing that no "property right" was involved. Even if the requirement of a property right would be imposed, it may be asked what other "property right" a lawyer can have than his reputation for ability and integrity. Whether the conduct of the defendant constitutes disparagement or defamation is immaterial. If the defendant has a complaint with the attorney, he can take it to the grievance committee of the bar association or a similar tribunal. His position is no different than that of the dissatisfied buyers in the automobile cases. Nor did the court indicate that the public has any "special interest" in hearing about an attorney; it merely failed to find a "property right" and automatically refused relief.

Of like import is *Garipey v. Springer*.¹⁰⁵ There the dissatisfied client sent out circulars stating that the attorney was engaged in practice with a dishonest partner and that he had "wrecked the defendant's family." The plaintiff alleged that he had to answer the charges to people who kept asking him about it. The court held that it would not enjoin a libel even if it injured the individual's business reputation. That the court was not concerned about inhibiting expression is demonstrated by its observation that if the plaintiff could show that the defendant was attempting extortion, it would grant the injunction. In *Wolf v. Harris*,¹⁰⁶ the court refused to enjoin the defendant from alleging that the plaintiff physician committed malpractice resulting in the death of the defendant's daughter. There was evidence of extortion. The basis of the decision was Fox's Libel Act, as discussed previously, which prevented the issuance of an injunction. It said that if the plaintiff first obtained a judgment for damages or had joined a claim for damages, once the jury had found in his favor, an injunction against future publication would be ordered. Even assuming the analysis of Fox's Libel Act to be sound, it is difficult to see why the court did not call in a jury to determine the libelous and untruthful character of the publication.

In all of these cases an injunction should have been granted. The public interest in hearing about the activities of these persons is slight. If they have acted improperly, their conduct can be reported to the proper professional authorities. The injury to their reputations

104. *Supra* note 74.

105. *Ibid.*

106. *Supra* note 75.

can be extensive. The defendant will have the opportunity to assert the defenses of truth and the like before the court. The only danger is that the court will err and the public be deprived of some information. Since the matter is not of great public interest—any more so than the quality of property—and the injury to reputation can be severe, the court should take the risk of error and issue the injunction.

The situation where the refusal of the injunction becomes more acute is where other interests than reputation are injured by the publication such as the right to a fair trial. In *Bailey v. Superior Court*,¹⁰⁷ the plaintiff was a criminal defendant charged with murder. Prior to the trial the defendant advertised that he would produce a play. The play was alleged to be based on the facts concerning the case for which the plaintiff was being tried, and the plaintiff complained that the publication of it would identify him and prevent his receiving a fair trial. The court held that the injunction could not constitutionally be issued, since the court cannot act as a censor. Here the public interest in hearing about the matter would conflict with the right of the plaintiff to have a fair trial. In this country, unlike England, we permit "trial in the newspapers."¹⁰⁸ Assuming that the guarantee of free expression prohibits the courts from enjoining reporting of the facts of the case, a decent compromise would give the criminal defendant the right to insist that the facts are not untrue or embellished. The public can get all the facts after the trial! Moreover, some of them will be acting as jurors—potentially they all are—which imposes a limitation on their right to receive the expression. Therefore, it is submitted that an injunction should be issued in such a case.

Another situation where the injunction should have been issued without any reference to the question of constitutionality is *Ryan v. City of Warrensburg*.¹⁰⁹ The defendants were municipal officers who, it was alleged, were spreading untrue statements about the plaintiff in an effort to make him cease conducting his barbershop in connection with his residence, which was illegal. The court held that an injunction against the issuance of libelous statements would be unconstitutional.¹¹⁰ The answer is that municipal officials do not have the right to harass citizens by libel or otherwise if they are violating the law. In such a case they should resort to criminal prosecution or other remedies to insure compliance. The injunction should have been granted against improper acts by municipal officials irrespective of whether those acts involved expression.

In summary, there should be no question as to the power of the

107. 112 Cal. 94, 44 Pac. 458 (1896).

108. For an excellent discussion of the impact of newspaper publicity upon the trial of a case see Lofton, *Justice and the Press—Communication Inside and Outside the Courtroom*, 6 St. Louis U.L.J. 449 (1961).

109. 342 Mo. 761, 117 S.W.2d 303 (1938).

110. This was on the basis of Fox's Libel Act.

court to enjoin expression when the injury is to personal reputation any more so than when the injury is to the reputation of a product or the expression involves "verbal acts." In each instance there is the same inhibiting effect on expression. Where the public interest in hearing such expression is slight and hence, outweighed by the injury to reputation that can result from the dissemination of such expression, injunctive relief should be granted.

THE RIGHT TO BE LET ALONE

Bodily and Personal Security

Here the invasion may come about in basically one of two ways, physical assault or harassment. Individual assaults have not been enjoined. In *Ashinsky v. Levenson*,¹¹¹ the defendant had been disrupting religious services and had been molesting the spiritual leader. The court enjoined him from entering the synagogue—repeated trespasses to land¹¹²—but refused to enjoin him from accosting or molesting the spiritual leader. The court said that there was "an adequate remedy at law." In *Kostoff v. Harris*,¹¹³ the court refused to enjoin the defendant from injuring the plaintiff with whom he had previously engaged in an altercation, saying that damages and criminal prosecution were adequate remedies.

The courts cannot mean that damages are "adequate" as the term has traditionally been understood. No amount of money can compensate for the pain and suffering and the physical injuries that result from an assault. And the mere fact that the act constitutes a crime does not prevent injunctive relief if other remedies are not adequate. So too, ordinarily an individual cannot institute criminal prosecutions unless the state approves. The result, however, is correct, since an injunction would have no effect. A party intending to commit an assault is no more deterred by the issuance of an injunction than he is by the threat of an action of damages or arrest and criminal prosecution.¹¹⁴ We are dealing here with strong personal feelings that the law cannot affect. The only result of the issuance of such a decree would be that the defendant would be punished by contempt rather than by criminal prosecution or by punitive damages in a civil action. The injunctive process will be of no avail in such a situation, and it is submitted that the issuance of an ineffective injunction merely breeds disrespect for the legal processes.

On the other hand, no personal feelings were present in a case

111. 250 Pa. 14, 100 Atl. 491 (1917).

112. Damages are an inadequate remedy there because of the need for a multiplicity of suits.

113. 266 S.W.2d 204 (Tex. Civ. App. 1954).

114. It has been said that if there is time to apply for an injunction, there is time to apply for police protection. *de Funiak, supra* note 11, at 11-12. However, the availability of police protection would not necessarily mean that "other remedies were adequate." For example, one can also call the police to eject a trespasser.

such as *Crew v. W. T. Smith Lumber Co.*¹¹⁵ There the defendant claimed title to the land on which the plaintiff was conducting timber cutting operations and threatened violence against the plaintiff's employees and contractors to prevent their cutting the timber. The court refused to grant the injunction, since "equity would not enjoin a personal trespass." This is unsound. Even assuming that damages would be adequate for interference with the plaintiff's economic interest,¹¹⁶ they would not be for any physical injury caused to these persons. There is no evidence of personal malice as to them, so the deterrent effect of an injunction is more likely to be effective here. The defendant is merely being enjoined from employing unlawful means to accomplish an objective.¹¹⁷ The effect of the injunction is to prohibit those means and to tell him that he must resort to the legal processes to oust the plaintiff. The absence of personal feelings distinguishes this from the other assault cases and an injunction can be effective. Since damages would not be adequate for any personal injury that might result, an injunction should be granted.¹¹⁸

So too, can injunctions be effective against collective assaults. In *United States v. Marine Engineers Beneficial Ass'n*,¹¹⁹ the court refused to enjoin the defendants from threatening to attack non-union seamen. Suit was brought by the United States in a non-governmental capacity to protect its interest in the docks. The court indicated that an injunction to prevent interference with the operation of the docks would be proper, but that it could not "enjoin an assault." This is most unsound. The injunction, like any order in a labor dispute, would be effective against the union leaders. Even though there might be hostility against non-union seamen, it must be assumed that the union leaders are sufficiently responsible so that they will obey the injunction—at least they are no less likely to do so than any other defendant. Later cases have recognized the distinction between enjoining individual assaults and collective violence by organized groups, and unions have been enjoined from permitting violent picketing by its members and from preventing other employees from working.¹²⁰ It is not accurate then to say that an assault will not be enjoined. Rather it should be that personal assaults will not be enjoined where the injunctive process is likely to be ineffective, but

115. 268 Ala. 628, 109 So. 2d 721 (1959).

116. This is doubtful. Even though lost profits may be recoverable, they are not considered an adequate remedy to justify the refusal of specific relief. For example, where the court finds an interference with commercial relations, injunctive relief is always considered affirmatively proper.

117. Analogous to competition by unfair methods, which is enjoinable.

118. The relationship between the plaintiff and his employees would be sufficient to justify his asserting their rights. See *International News Service v. The Associated Press*, 248 U.S. 215 (1918), where a news distributing agency was held to be entitled to injunctive relief on the grounds that such relief was necessary to protect its subscribers.

119. 277 Fed. 830 (W.D. Wash. 1921).

120. *N.W. Pac. R. Co. v. Lumber & Sawmill Workers Association*, *supra* note 98; *Southern Bus Lines v. Amalgamated Association*, 205 Miss. 354, 38 So. 2d 765 (1949).

that in economic disputes or other instances of group activity, assaults should be enjoined, since damages and other remedies are clearly inadequate.

The same considerations may be present in a situation where the defendant, by one method or another, is harassing the plaintiff. An older case in which the court refused to issue an injunction is *Chappell v. Stewart*,¹²¹ where the defendant caused private detectives to "shadow" the plaintiff. The plaintiff alleged that the conduct "caused him great inconvenience and annoyance, interfered with his social intercourse and business, and caused grave suspicions to be entertained about him, so as to damage his financial credit." The court gave two grounds for the decision: (1) damages were adequate; and (2) "equity protected only property rights." Although a cause of action for damages resulting from "shadowing" has been recognized,¹²² the recovery of damages clearly would not be adequate, since there is no way of measuring the injury to feelings, the annoyance, and the possible injury to reputation that could result. In any case, this involved a continuous course of conduct, so the need for a multiplicity of suits—a cause of action would presumably arise each time the plaintiff was "shadowed"—would render the damages remedy inadequate.

It has been suggested that the result is correct since the plaintiff has suffered no "actionable wrong"; public policy, it is contended, would prohibit recognizing the right of an individual to be immune from properly conducted observations by detectives.¹²³ There are two answers to this viewpoint. The first is that the court assumed that a substantive right had been violated. Secondly, it did not appear that the defendant had any reason to observe the plaintiff.¹²⁴ The author cannot mean that a person must go through life under the observation of detectives merely because another wishes to see what he is doing.

Substantively, there should be the right to be immune from such observation unless the defendant can demonstrate justification for the observation, *e.g.*, the plaintiff is his spouse whom he has good reason to suspect of infidelity. Injunctive relief is both necessary and practicable. We have demonstrated that damages would be inadequate because of the personal feelings involved and the possible injury to reputation with all the conceivable harm such injury might bring. Violation of the injunction would not be difficult to prove, and the intensity of feeling involved is not such as is present in the case of a physical assault. An injunction should be issued here in the absence of a showing of justification.

A slight annoyance will not be enjoined and should not be. In

121. 82 Md. 323, 33 Atl. 542 (1897).

122. See *Schultz v. Frankfort Marine Insurance Co.*, 151 Wis. 537, 139 N.W. 386 (1913).

123. Long, *supra* note 11, at 125.

124. The case came up on demurrer, so there was no question of affirmative defenses such as justification.

Williams v. O'Shaughnessy,¹²⁵ the complaint alleged that the plaintiff's former attorney was constantly sending her letters and excerpts from the Bible. The court found that this was not done solely for the purpose of annoying her and that no correspondence was sent after she had requested that he stop, and refused the injunction. An injunction should not be granted here, even if the sole purpose was annoyance, since all the plaintiff had to do was to throw away the unopened letters. This is the type of case in which the plaintiff is trying to employ the processes of the law for a purpose for which they were never intended.

A similar situation was presented in *Smith v. Hamm*.¹²⁶ The parties were neighbors who did not get along, and one set sought to enjoin the other from cursing them, falsely accusing their daughter of misconduct and directing threats against the plaintiffs. The injunction was refused, the court noting that the plaintiff could commence a criminal prosecution by filing a complaint.¹²⁷ The real point is that the law cannot be bothered with such matters; it cannot regulate through the injunctive process the day to day relationships of people. Neighbors will quarrel and harass one another. If any regulation is to take place, it should be through criminal prosecutions for breach of the peace. Otherwise, the parties must work things out themselves. Nothing else could be accomplished if the court had to spend their time making one neighbor leave the other alone. The injury is not sufficiently serious that the matter should take up judicial time. So too, continuous trespasses over the grass causing no injury and the constant using of offensive and insulting language toward the plaintiff and his wife do not cause such injury that the court must take cognizance of the problem.¹²⁸ Also, the plaintiff could possibly have the defendant arrested if an ordinance prohibits cursing and the like. In any event, the employment of the injunctive process is not necessary because of the insufficiency of the injury.

But in a case such as *Hawks v. Yancey*,¹²⁹ there is more than mere annoyance. The defendant is trying to make himself a part of the plaintiff's life against her will and to prevent her from forming relationships with others. There the plaintiff had previously engaged in illicit relations with the defendant, but had broken off the affair. The defendant constantly accosted her in public, begging her to take him back, made statements about her and made false charges to the police about her. She told him she was engaged to another man, and he was

125. 172 N.Y.S. 574 (Sup. Ct. 1918).

126. 207 Ark. 507, 181 S.W.2d 475 (1944).

127. Here also the plaintiff could commence a criminal prosecution by filing a complaint before a magistrate. It apparently was not necessary that the prosecutor approve. On that basis the case was distinguished in *Webber v. Gray*, 228 Ark. 289, 307 S.W.2d 80 (1957), where the court enjoined harassment of a more serious nature. Still, because of the nature of the harassment here, I doubt if the court would have granted an injunction even in the absence of this authorization.

128. *Randall v. Freed*, 154 Cal. 299, 97 Pac. 669 (1908).

129. 265 S.W. 233 (Tex. Civ. App. 1924).

trying to persuade her fiancé not to marry her. The court enjoined this conduct and directed him not to harass her by these actions.¹³⁰ Clearly damages are not adequate to redress the personal injury involved. She could call the police to prevent his bothering her in public, but could not prevent the other conduct. The only question is the practicability of issuing the injunction.

Here strong emotions are present. But the desire for a relationship is unilateral; there is no question of two people acting in concert to establish a relationship against the wishes of a third.¹³¹ A violation can be easily shown. The interference is with a real and substantial interest of the plaintiff. Injunctive relief is the only possible device by which she can be protected from this unwanted intrusion in her life. The court should issue the injunction in hopes of preventing the violation, but if it is violated, then it can punish the defendant by contempt proceedings. The risk of injury to the efficacy of the legal process by the issuance of an injunction is outweighed by the necessity of protecting this vital interest.

Moreover, there is a substantial possibility that the injunction will be obeyed since violations can be easily detected. The defendant is more likely to avoid violation when the other party to the relationship he seeks to form is hostile to such formation than when she is willing.

The same reasoning justified the issuance of the injunction in *Webber v. Gray*.¹³² The plaintiff had formerly had an affair with the defendant and had had sexual relationships with her. He terminated the relationship and subsequently got married. The defendant wrote letters to the plaintiff, his wife, his mother and his employer in which she stated that he was the father of her unborn child. She announced that she had married the plaintiff and published this in the local paper. She would daily accost him in the street, follow him to work and leave notes in his car. The court enjoined all these activities. It did not enjoin her driving near his home, which indeed, is too broad a restraint.¹³³ Again, this is more than slight annoyance. Here is a complete intrusion into his life, making it unbearable.¹³⁴ Whether the injunction will work is questionable. The defendant is obviously in need of psychiatric help. Still it may. Again, violations are easy to detect, and there is not the question of persons acting in concert to preserve a relationship. Perhaps the injunction will be "shock

130. The court also held that because of the statute it was not necessary to find a "property right."

131. Compare the cases involving affairs with third parties, *infra* notes 204-20 and accompanying text.

132. *Supra* note 127.

133. The court also did not enjoin her instituting suit against him for breach of contract to marry.

134. The court also held that the bar of unclean hands was inapplicable because of the interest of the innocent wife. *Cf. Nat'l Dress Manufacturers Association v. United Association of Dress Manufacturers*, 151 Misc. 827, 272, N.Y.S. 360 (1934), refusing to apply the bar to avoid enforcement of a contract where such non-enforcement would result in 40,000 workers losing employment.

therapy." In any event, it must be issued in the hope that the plaintiff will have some chance of leading a normal life free of such harassment.

Hunt v. Hudgins,¹³⁵ where an injunction was also granted, is a closer case. The plaintiff had previously made the defendant pregnant, and she had submitted to an abortion. He had settled with her for a sum of money. Subsequently he married. The defendant made threats to the plaintiff and his wife, cursed them whenever she saw them and did "other acts to harass and molest them." The extent of harassment was not nearly so great as in *Webber v. Gray*. The result may be correct when the interest of the plaintiff's wife is considered. The court emphasized that she was innocent and that the plaintiff had "a right to maintain his home." While the harassment may not have been of such magnitude as to make life completely intolerable, nonetheless, it could have an adverse effect on the marriage relationship between plaintiff and his wife. Doubtless she was not overly pleased about her husband's prior liaison and did not desire constant reminders of it. She could escape this harassment by leaving him, and the combination of the harassment and the unpleasant association could seriously impair this marriage. Under these circumstances the interest was sufficient to justify the injunction. In *Blanton v. Blanton*,¹³⁶ the plaintiff claimed he was not legally married to the defendant and a suit for annulment was pending. The court enjoined her from making money demands of him and accosting him at his home or place of employment pending litigation. The temporary nature of the restraint may justify the result, but it does not seem that the interference was sufficiently great as to justify the issuance of injunctive relief. Presumably she would cease this conduct if the marriage was annulled. If it was not annulled, then she was doing only what she had a right to do. If annulment were granted and the conduct persisted, then perhaps the injunction would be proper.

In these harassment cases the question should be whether the degree of interference is such that injunctive relief should be ordered. Where the conduct of the defendant makes living intolerable or threatens to disrupt a marriage, an injunction should be issued. The serious adverse effect justifies running the risk the injunction will be violated, since a violation can be detected easily enough. But for the ordinary annoyances that result when people cannot get along, the judicial processes should not be employed. There are too many serious interests that need protection for the courts to spend their time trying to make people leave others alone in everyday living.

Confidential Records and Letters

The privacy involved here enjoys a special distinction, since it was the first personal interest to be protected under the guise that the

135. 168 S.W.2d 703 (Tex. Civ. App. 1943).

136. 163 Ga. 361, 136 S.E. 141 (1926).

court was protecting a property right.¹³⁷ Consequently, there can be no doubt that it will be protected today. In *Gee v. Pritchard*,¹³⁸ the plaintiff and her husband had taken the defendant in as a boy and had raised him. The plaintiff had written him letters apparently of a very "endearing" nature. They had had a dispute, and she showed her disfavor of him publicly. He intended to publish those letters to show her "true feelings" toward him. She brought suit to enjoin the publication of the letters.

Lord Eldon, while causing inestimable harm to injunctive protection of personal interests by his statement that "equity protects only property rights," found a property right present and in doing so protected the plaintiff's interest in having her personal sentiments kept secret. He declared that the writer of a letter has a "property right in the contents." This "property right" was inferior to the "special property" right of the receiver. The only realistic part of the opinion was the realization that the receiver has no license to publish the contents of the letter to the public. This recognizes the substantive right to privacy of the sender. Damages are obviously inadequate to measure the injury to feelings by the disclosure of matters intended to be kept confidential. There is no problem of enforcement, as the defendant could be ordered to surrender the letter. In *King v. King*,¹³⁹ Mary King wrote letters to Francis King while he was married to Margaret King. Apparently Mary was the second Mrs. King. These letters were obtained by Margaret King and used in her divorce action against Francis. She now sought to get the letters back from the court. The alleged purpose was to use the letters against Mary King in the Eastern Star Lodge, apparently to oust her from membership. The court enjoined Margaret from obtaining the letters and making them public, applying the rule of *Gee v. Pritchard*. Again, these were personal letters no doubt expressing strong feelings of the plaintiff, and she had the right to have these feelings kept from all but the recipient.

The concept of property right has served to prevent disclosure of the letters after the sender was dead and his interest in privacy ceases to exist.¹⁴⁰ In *Baker v. Libbie*,¹⁴¹ the plaintiff was the executor under the will of Mary Baker Eddy, the founder of the Christian Science Movement. She had sent some letters to the defendant dealing with *commonplace* subjects and involving no personal sentiments or the like. The defendant sought to publish these letters for commercial purposes. The court enjoined their publication, stating that the sender had a property right in the letters which passed to her estate. Here not only was the sender dead and her feelings beyond the range

137. For a discussion of the historical significance of this see Pound, *supra* note 10.

138. *Supra* note 7.

139. 25 Wyo. 275, 168 Pac. 730 (1917).

140. Ordinarily the tort, as with defamation, would not survive the death of the plaintiff because of its intensely personal nature.

141. 210 Mass. 599, 97 N.E. 109 (1912).

of injury, but the subject matter was such that even had she lived there could be no injury to feelings by disclosure of private matters. There was, thus, nothing here to injure the feelings of her descendants. The court recognized what the issue really was and while following precedent really achieved a sensible accommodation. Publication of the letters for advertising or commercial purposes was enjoined, but the defendant was permitted to sell the letters to autograph collectors, which would enable him to reap substantial profit. The estate did not want her letters published unless royalties were paid. This case involved purely property matters and was treated as such. We must distinguish between the situation where the publication of letters involves personal feelings and where it involves commercial matters.¹⁴² Though the result is the same in both instances, the underlying rationale is entirely different. It is doubtful whether the woman's descendants in a situation like *Gee v. Pritchard* could today enjoin publication of personal letters unless privacy is deemed to extend to the descendants. So too, it is doubtful whether an ordinary person could enjoin the publication of commonplace letters, since there would be no injury to feelings by such publication. Unless there is an economic question, there is no reason to enjoin publication of letters in the absence of real privacy's being involved, *i.e.*, the publication would reveal matters the writer would want to keep secret.

However, neither privacy nor the commercial interest in letters will or should be protected when the public interest demands revelation of the contents of the letter. In *Barrett v. Fish*,¹⁴³ the plaintiff sought an injunction to restrain the prosecuting attorney from producing letters written by the plaintiff to be used in a criminal proceeding against him. The plaintiff was being tried for adultery, and the letters tended to prove criminal intimacy. Although recognizing the plaintiff's "property right" in the letters, the court held that this interest must yield to the public interest in the administration of justice and refused the injunction. If the plaintiff had the letters, he could not have been forced to produce them, since this would constitute self-incrimination; but he could not prevent the defendant from using them. The court went on to say that any individual may be required to produce letters written to him despite the interest of the sender and himself unless to do so would violate his privilege against self-incrimination. This exception was originally recognized by the court in *Gee v. Pritchard* as well. It is an example of the public interest as a defense to injunctive relief.¹⁴⁴

142. The commercial nature of the interest is demonstrated by *Folsom v. Marsh*, 9 Fed. Cas. 342, No. 4901 (C.C.D. Mass. 1841). The defendant published a work of Washington's letters that the plaintiff claimed infringed his copyright. The court held that there was no right to publish the private letters of a person without his consent and since only plaintiff had the consent, the injunction was granted. It was found that these particular letters were not "public documents."

143. 47 Atl. 174, 72 Vt. 18 (1899).

144. As in *Krebiozen*, *supra* notes 77-80 and accompanying text.

The personal privacy of letters should be protected against improper disclosure by the recipient, unless the letters must be produced to assist in the administration of justice or the public interest otherwise demands their production.¹⁴⁵ Since the personal interest is what is really involved, protection should not extend to commonplace letters or exist after the death of the sender. If the letters have economic value because of the stature of the sender, this interest should be protected under the same conditions that govern the protection of any economic interest.

Disclosure of Arrests Not Terminating in Conviction

The problem arises in this area simply because police officers, prosecutors and many citizens, particularly employers, do not believe that a man is innocent until proven guilty. Rather they assume that an arrest has independent significance and that "good people" are not arrested. When an arrest does not terminate in conviction, it is only because "he got off on a technicality" or "he had a smart lawyer." Employers wish to avoid taking a chance on people who have been arrested. This may be equally true of dispensers of credit.

From the standpoint of the person whose arrest has not terminated in conviction, the fact of arrest is a matter he does not want revealed for these reasons. The public may consider him guilty, he may be refused employment or credit, and he may be a prime suspect for future crimes both in the place where he was arrested and elsewhere if the fact of arrest and accompanying data is disclosed to police in other cities. The issue is whether he can obtain an injunction against such disclosure. In this context, we will really be concerned with the substantive nature of the interest, that is, to what extent is privacy protected against this type of disclosure. It is clear that injunctive relief is necessary, as the damages could not be measured with any degree of certainty.¹⁴⁶ Moreover, governmental officials will be in-

145. See also *Brex v. Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (1929), where the court protected the privacy of bank accounts from improper disclosure. A prosecuting attorney was investigating corruption in the police department and sought to inspect the bank accounts of all the policemen and their wives. The court concluded that he was on a "fishing expedition" and that there was a right to have such records secret except where there was probable cause to believe that they contained matters of public concern. The injunction was granted. Even though damages might be recoverable, the court held they were too speculative to constitute an adequate remedy. Cf. *Frey v. Dixon*, 141 N.J. Eq. 481, 58 A.2d 86 (Chan. 1948), where the policemen who were called to appear with their records before a grand jury pursuant to a subpoena duces tecum, sought an injunction against enforcement of this requirement. It was held they had an adequate remedy by way of a motion to quash the subpoena.

146. As the Missouri Supreme Court observed in *State ex rel. Reed v. Harris*, 348 Mo. 426, 153 S.W.2d 834, 837 (1941), in holding that a court had the power to award injunctive relief in such a situation:

We are satisfied that an action at law for damages would not be an adequate remedy. The damage, if any, flowing from the display of an innocent person's photograph in the rogues' galleries throughout the country, is or might be a continuing one, and not capable of any fair estimation or measurement by a money judgment. The remedy at law would be incomplete, less prompt, and less efficient than resort to equitable relief, and hence, would not constitute a bar to the latter.

volved as defendants, against whom recovery of damages probably would not be authorized.

The clearest case where an injunction is proper is *Itzkovitch v. Whitaker*.¹⁴⁷ The plaintiff had been arrested on suspicion of being a fence. He was photographed, and the photo was placed in a rogues gallery open to the public. The police were also planning to send the photo to police in other cities. The defendant argued that the court had no authority to interfere with the police in the proper discharge of their function of fighting crime. The court's answer was that the plaintiff had never been convicted of any crime. If the picture was displayed in a rogues gallery, it would be "permanent proof of dishonesty." The public who observed such pictures would not draw the distinction between those innocent and those guilty. The court established the rule that a photo could not be displayed in the rogues gallery unless the person had been convicted of crime, and ordered the negative returned to the plaintiff.¹⁴⁸

This principle has been recognized in a number of other cases. In *McGovern v. Van Ripper*,¹⁴⁹ the court refused to enjoin the taking of photographs of the arrested person, but stated it would enjoin any publication of them prior to conviction unless the plaintiff should become a fugitive from justice, observing that an innocent person is defamed by such publication. Here the state claimed that publication was authorized by statute. The court held that to the extent the statute authorized such dissemination, it was unconstitutional as an unreasonable interference with an individual's good reputation and the right to be let alone. There is no public interest in displaying the photograph of a person who has been arrested unless such arrest terminates in conviction. Once the arrest has terminated in conviction, any injury to reputation or privacy was classified as "negligible."

In *State ex rel. Mavity v. Tyndall*,¹⁵⁰ the court held that a mandatory injunction would be granted to require removal of the photo from the rogues gallery after the plaintiff had been acquitted. It said that the complaint stated a "prima facie case of a violation of the right of privacy." In *Downs v. Swan*,¹⁵¹ a case involving sufficiency of the complaint, the court held that the complaint would be dismissed, since it only alleged that photographs would be taken and not that they would be displayed in a rogues gallery even if the plaintiff were acquitted. The court observed as follows:

[B]ut we must not be understood by so doing [dismissing the complaint] to countenance the placing in the rogues gallery of the photograph of any person, not a habitual criminal, who has been

147. *Supra* note 15.

148. See the discussion of this case and approval of the result in Bennett, *supra* note 11, at 688-89.

149. 137 N.J. Eq. 24, 43 A.2d 514 (1945).

150. 224 Ind. 364, 66 N.E.2d 755 (1946).

151. 111 Md. 53, 73 Atl. 653 (1909).

arrested, but not convicted, on a criminal charge, or the publication under these circumstances of his Bertillon record. Police officers have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable to the injured person in the same manner and to the same extent that private individuals would be.¹⁵²

However, an injunction is not necessary where the public will not see the photographs. In *Hansson v. Harris*,¹⁵³ the plaintiff sought to enjoin the chief of police from placing the photos in a "rogues gallery." The court found that this was not a rogues gallery in that it was not open to the public. The photos were indexed by crime, and only persons seeking to identify suspects were permitted to enter. Thus, the court concluded that injury present in the other cases would not be present here. In *Kolb v. O'Connor*,¹⁵⁴ the court refused to enjoin as an invasion of privacy retention of photos and other identification records after acquittal where they would be exhibited only to victims of crime for identification of suspects. The court specifically recognized that today's innocent citizen may be tomorrow's criminal; this is judicial acceptance of the fact that we do not really believe that an acquitted person is necessarily innocent. And in the *Tyndall* case, the court indicated that the injunction would not be granted if the gallery was not open to the public.

It would seem then that an injunction will be granted except when the photos will not be used by anyone other than the police. This raises a more difficult question: should the retention of the photos by the police be enjoined, or their dissemination to law enforcement officers elsewhere. There is the danger that persons will be incorrectly identified as suspects and possibly be convicted. As we discussed previously, police simply are unwilling to accept a judgment of acquittal as proof of innocence in many cases. It can be contended that in these circumstances the court is interfering with the work of the police in crime detection. The risk of misidentification is one that any criminal defendant bears. If the police feel that the fact that a person has been arrested is of some relevance in crime detection, this should be within their discretion. The court's concern should be solely with the protection from disclosure of the person's picture to the public. Therefore, an injunction should not be granted against retention nor dissemination to police officers in other cities unless the pictures will be publicly displayed in those cities. The court should permit dissemination only upon condition that the photos would not be so displayed. By such an approach the courts reach a proper accommodation between the interest of the police in law enforcement and the interest of the citizen in not suffering injury to his reputation and

152. 73 Atl. at 656.

153. 252 S.W.2d 600 (Tex. Civ. App. 1952).

154. 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957).

right to be let alone by being branded as a criminal, though he was not convicted.

The same reasoning is applicable to arrest records. In *Miller v. Gillespie*,¹⁵⁵ the court refused to order the police department to surrender the arrest record after conviction. It noted that it was necessary to have a record of police activities for future use. It also observed that there was no question of the plaintiff's being exposed to public ridicule as a result. So long as the record stays within the police files or is circulated to other law enforcement agencies, there has been no interference with the plaintiff's rights. But, under the same reasoning as applicable in the photo situation, if these records are made public or disclosed to persons such as employers, there has been an invasion. The police are permitting him to be treated as if he was convicted, which he was not. It is no one's concern that he has an arrest record where the arrests did not terminate in conviction. Consequently such disclosure should be enjoined.¹⁵⁶ In all these instances the public interest can be adequately protected by permitting the police to retain these matters of identification, and the individual's interest likewise by preventing disclosure to the public at large or private individuals having no connection with law enforcement.¹⁵⁷

Improper Exposure or Use of Name

Here we are dealing with the traditional concept of tortious invasion of privacy. As the Restatement puts it:

A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.¹⁵⁸

There are two distinct aspects to this tort. First, there is the unauthorized use of a person's name or likeness for advertising or other commercial purposes. Secondly, there is the publication of reports about a person where the report is not "newsworthy" or is embellished or fictional. We are not now concerned with the substantive law as to what constitutes an invasion of privacy.¹⁵⁹ It is recognized that many

155. 196 Mich. 423, 163 N.W. 22 (1917).

156. This was done in a lower court case in St. Louis. *Cissel v. Brostron*, No. 31383 (St. Louis Cir. Ct. 1962). Although an appeal was taken, St. Louis Daily Record, Jan. 31, 1963, no official disposition of the appeal can be found.

157. The mere taking of fingerprints has not been enjoined. *Kolb v. O'Connor*, *supra* note 154; *State ex rel. Mavity v. Tyndall*, *supra* note 150. Fingerprints are taken routinely in many situations today. Moreover, they are not "open to the public." Cf. *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947), where the court upheld as constitutional a city ordinance requiring employees of bars and retail liquor stores to submit to fingerprinting, such fingerprints to be forwarded to neighboring and federal law enforcement officers. The court noted that there was no question of a "rogue's gallery" here.

158. RESTATEMENT, TORTS § 867 (1939).

159. The classic article which was to a great degree responsible for the recognition of the tort, Warren and Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), should still be read today for an understanding as to the substantive nature of the tort. An excellent discussion of the substantive law will be found in *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).

items are newsworthy and that the public has a right to hear about its "leaders, heroes, public figures and victims." Our concern is whether once it has been established that the actions of the defendant constitute an invasion of privacy, injunctive relief is available to suppress future publication.

It is well established that the unauthorized use of a person's name or likeness for advertising or other commercial purposes can be enjoined. The leading case establishing this proposition is *Edison v. Edison Polyform Co.*,¹⁶⁰ where Thomas Edison's name and picture were used to advertise the defendant's products. Protection is not limited to "famous persons." In *McCreery v. Miller's Grocerteria*,¹⁶¹ the plaintiff hired a photographer to take her picture. He took the picture and gave the negative to a coffee company and grocery company, which they used to advertise the coffee. The court held that an injunction would lie to restrain such use.

Here the court is protecting the person's interest in his privacy and feelings. The plaintiff may not want his name or picture used to advertise any or certain products. More significantly, however, a true property interest is involved, and injunctive protection is proper as a matter of commercial necessity. Indorsement of products, both by famous personages and ordinary users, has become quite common. Businessmen are satisfied that such endorsements increase sales and consequently is willing to pay for them. One company's obtaining an indorsement will go for naught if another company can pirate the indorsement and be liable only in damages to the owner, since the price paid by the first company may have reflected exclusive indorsement rights. Also using an individual's indorsement without his consent deprives him of his bargaining power; the defendant may use the indorsement knowing he will have to pay only what a jury may award some years later. Consequently an injunction here protects economic interests as well as personal ones, and it is undisputed that injunctive relief is available.

Where no commercial question is involved, the courts have been more ambivalent. Consider the following situation: the plaintiff is a reformed prostitute living with her husband and family in a suburban community; it is many years since she has abandoned her trade; the defendant is planning to publish a story about her career as a prostitute.¹⁶² Should an injunction be granted once the court decides that the story is not "newsworthy" and hence the publication constitutes an invasion of privacy? Obviously, damages cannot be adequate to compensate for the injury to feelings and to reputation that result from the publication.¹⁶³ If an injunction is to be refused,

160. 73 N.J. Eq. 136, 67 Atl. 392 (Chan. 1907).

161. 99 Colo. 499, 64 P.2d 803 (1936).

162. These are basically the facts in *Melvin v. Reid*, *supra* note 159.

163. For a discussion of the damages recoverable for such an invasion see *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.2d 742 (1952).

it can only be because it would improperly inhibit free expression.

But before the court finds the conduct to be an invasion of privacy, it must find that the publication is not newsworthy, that is, the public has no interest in finding out about the subject matter of the publication. Employing the test we did in the defamation area,¹⁶⁴ it is contended that an injunction is proper. Serious injury to sensibilities and reputation can result from the publication of something that *admittedly the public has no interest in hearing about*. The tort protects private and unknown individuals against having their affairs revealed to the public at large or their sensibilities wounded by disclosure or dissemination of matters personal to them. If we admit that the public has no interest in hearing about these items, free expression—insofar as emphasis is placed upon the public's right to know—should be no bar to protection by injunctive relief.

The problem is that the unrealistic approach to defamatory publication may be followed here. This fallacy combined with syllogism, can be employed to prevent issuance of an injunction: defamation can never be enjoined because of interference with free expression (fallacious); publication of a matter invading privacy involves expression; ergo, publication invading privacy cannot be enjoined. This was followed to a "logical inconsistency" in *Corliss v. E. W. Walker*.¹⁶⁵ The plaintiffs sought to prevent the publication of a biography of their husband and father, a well-known inventor, and the use of a photograph of him on the ground that such publication would injure their feelings. In the first place there is great doubt as to whether the publication would constitute any wrong: the inventor was dead and at least at that time and probably today, the mere publication of a person's life story could not be said to be an invasion of the privacy of his descendants. Moreover, the court emphasized that it did not consider him to be a private character. The result then is justifiable on the ground that the actions of the defendant did not constitute an invasion of privacy.

But the court went on the ground that under no circumstances could it prohibit the publication of the biography in view of the constitutional guarantee of free expression. Thus, in our example, the "biography" of the reformed prostitute, even if not newsworthy, could not be enjoined, since it involved expression. However, the court did enjoin the use of the photograph, since it was obtained from the plaintiffs on certain conditions and the defendant breached those conditions. So, in our example, if she told him the story on the condition that he not publish it, this could be enjoined, but not if he found the story out on his own.

The criticisms of the attitude toward the enjoining of a defamatory publication are applicable even more strongly here. The matter ad-

164. See the discussion, *supra* notes 81-89 and accompanying text.

165. 57 Fed. 434 (C.C. Mass. 1893).

mittedly is not newsworthy. Damages clearly are inadequate. Since the public has no interest in knowing about the matter, the public interest in hearing expression is not affected by the issuance of the injunction.

Other cases have taken a more realistic approach. In *Bazemore v. Savannah Hospital*,¹⁶⁶ a case involving sufficiency of the complaint, the plaintiff sought recovery of damages and an injunction against the defendant's publication of a photograph of the nude and malformed body of the plaintiff's deceased child. The child had been born deformed and had died shortly thereafter. The court held that the publication would invade the privacy of the plaintiff and cause her to suffer embarrassment and mental anguish. The court did not expressly discuss injunctive relief, but assumed the injunction would lie. By deciding that the publication would constitute an invasion of privacy the court decided that the public had no interest in seeing this photograph.

However, I would assume that most courts today would deny the injunctions against publication of a story on grounds of protection of free expression without considering the realities of the situation. This, as well as the fact that in these publication cases, the injury is not discovered until it is too late to seek injunctive relief, accounts for the paucity of cases that research has disclosed. The lower court case of *Clayman v. Bernstein*,¹⁶⁷ however, may represent a trend in the opposite direction. The defendant, a physician treating the plaintiff for facial injuries, took photographs of her, showing facial disfigurement. He had not published them nor was there any evidence he was going to do so. The plaintiff claimed that his possession of them caused her to suffer mental anguish. The court held that the complaint stated a cause of action for injunctive relief. Presumably the same rationale—protection of her feelings, which were injured by the existence of this photograph—would justify an injunction against publication. The court recognized that the analogy to libel law was fallacious.¹⁶⁸

In New York the matter is covered by statute, and it is settled that the injunction will be issued against an unauthorized use of a photograph or story for any purpose. In *Blumenthal v. Picture Classics*,¹⁶⁹ it was held that a street vendor could enjoin the use in a movie of a picture of her taken without her knowledge while she was at work. The court stated that the statute gave an absolute right to an injunc-

166. 171 Ga. 257, 155 S.E. 194 (1930).

167. 38 Pa. D. & C. 543 (1940).

168. See also *Friedman v. Cincinnati Local Board*, 6 Ohio Supp. 276 (1941), where the court enjoined a striking union from taking photographs and motion pictures of customers entering the plaintiff's restaurant on the ground that this violated the right to privacy of his customers. The court held that an ordinary individual has the right to insist upon his privacy and that the plaintiff could assert the privacy rights of his customers, since these rights were interfered with in order to affect his business.

169. 235 App. Div. 570, 257 N.Y.S. 800, *aff'd mem.*, 261 N.Y. 504, 185 N.E. 713 (1932).

tion whenever an invasion of privacy through unauthorized use was shown.¹⁷⁰ For whatever reason, the publication of this picture would have been undesirable to the plaintiff. Since there was no public interest in knowing what she was doing, the statute could constitutionally be applied to restrain publication. The same reasoning would justify an injunction in our case of the reformed prostitute, assuming the court would find that the acts of the defendant constituted an invasion of privacy.

On the other hand in *Donahue v. Warner Brothers Pictures Corp.*,¹⁷¹ the Utah statute authorizing an injunction against the improper use of a person's name *for trade purposes* was construed as not applying to a fictional portrayal of a person, but was limited to improper use for advertising purposes. The case involves what constitutes an invasion of privacy as a matter of substantive law and not the propriety of injunctive relief. The court's concern with free expression played a great part in its determination of the legislative intent. The same result could have been reached by determining that the statute protected against all invasions of privacy when the defendant sought to profit thereby, but that the person involved was a public figure (which he probably was) and that the portrayal was not improperly embellished. The restrictive reading of the statute ignores the fact that the two aspects of the tort—improper use and publication of matters not newsworthy—have traditionally been thought of as going together.

In summary, since damages are not adequate to compensate for the mental suffering and possible injury to reputation that results from such publication that constitutes an invasion of privacy, and since by definition the public has no interest in hearing these matters, injunctive relief should be granted.

THE RIGHT TO FAMILY RELATIONSHIPS

Third Party's Claim of Family Membership

Here the plaintiff finds it objectionable that a third party is claiming a family relationship to him or claims the same family relationship that the plaintiff claims. The cases have involved claims that a third party is the plaintiff's child, his spouse, or that the third party is married to the plaintiff's spouse.

The claim that a person is the plaintiff's child has its origin in illicit relationships on the part of someone. In *Vanderbilt v. Mitchell*,¹⁷² the plaintiff had not lived with his wife for some period of time. As might be expected, the wife was living with someone else and gave birth to a child. The wife falsely stated that the plaintiff was the father of the child and had his name placed on the birth

170. See also *Durgom v. C.B.S.*, 29 Misc. 2d 394, 214 N.Y.S.2d 752 (1961), holding that the statute created an absolute right to enjoin the unauthorized use of the plaintiff's name and that traditional defenses such as balancing of the relative hardships were inapplicable.

171. 2 Utah 2d 256, 272 P.2d 177 (1954).

172. 72 N.J. Eq. 910, 67 Atl. 97 (E. & A. 1907).

certificate. It was undisputed that he had no access to her during the possible period of gestation, so there was no question of the presumption of legitimacy. He sought an injunction to cancel the certificate and to enjoin the defendant and the child from using his name. The court held that the injunction would lie, finding that a property right existed, which at the time was thought to be a necessary requirement. The "property right" was that the "child of the plaintiff" had certain rights under a will. It was also noted that the child could make claims for support. Commentators have disagreed as to whether the case really protected a "personal right" or whether a "substantial property right" was involved.¹⁷³ In fact property interests may be threatened in a particular case. But this is beside the point. It would seem to be intolerable to have a bastard claim to be your child, and this to be a matter of public record. The personal interest involves the sensibilities of the plaintiff; also our society places a great stress on the "father concept." Just as a child should be entitled to a declaration of paternity to establish his status, so too should a person be entitled to a judicial declaration as to who his children are. Since this is a substantial interest for which damages are obviously inadequate, injunctive relief is proper.

The converse of the situation was presented in *Aimone v. Gerandi*.¹⁷⁴ Here the plaintiff committed adultery with a married woman who bore a child. She had his name placed on the birth certificate, and he sought the same type of relief as that awarded in *Vanderbilt*. The court held that he would be entitled to such relief. Despite his "immorality" he would seem to have the right not to have a child that is not legally his bear his name. More significantly such relief is desirable from the standpoint of the innocent child. If his name is on the certificate, the child would be bastardized, whereas if it is not the presumption of legitimacy would operate to protect the child. On the merits the court held that the presumption of legitimacy was overcome by proof of non-access, and the name was not ordered removed. In either situation our society's emphasis on paternity justifies injunctive relief to "set the record straight."

The next situation is where a party claims to be the plaintiff's spouse. In *Burns v. Stevens*,¹⁷⁵ the plaintiff sought to enjoin the defendant from claiming to be his common law wife. The parties had been living together, but were not married. The majority, once this fact was established, held the injunction would issue as of course. The dissenting justices found an absence of property rights and also held that the plaintiff should be barred because of unclean hands. Both arguments do not hold water, as the property requirement should

173. Professor Moreland treats the case as involving a personal right, *supra* note 11, at 207-08, while Professor Bennett treats it as involving property rights, *supra* note 11, at 675-76.

174. 108 N.J. Eq. 339, 155 Atl. 12 (Chan. 1931).

175. 236 Mich. 443, 210 N.W. 482 (1926).

be abandoned, and the improper conduct has been terminated. More significantly—and this relates both to unclean hands and the propriety of injunctive relief—it is societally desirable that marital status be established. Since there was no common law marriage, confusion of creditors and other persons would result if she were to continue to hold herself out as his wife. Because of his misconduct, we may feel that the injunctive process should not be employed to determine the status of this relationship, but the possible interference with the interests of innocent third parties justifies the injunction.

In *Randazzo v. Ropollo*,¹⁷⁶ the defendant went through the form of a marriage ceremony with a man impersonating the plaintiff. The court held that he was entitled to a declaration that he was not married to the defendant and an injunction restraining her from claiming to be his wife. Here he is entirely innocent and even absent considerations of harm to third parties, is entitled to an injunction. A person's sensibilities (and possibly reputation) can clearly be harmed by having another claiming to be his wife, whom he does not want.¹⁷⁷ And in *State ex rel. Herzog v. Koelling*,¹⁷⁸ the injunction ran against the recorder of deeds, who was required to cancel and expunge the marriage record, where the marriage was invalid.

However, the plaintiff is not entitled to require the woman to resume her maiden name. As a matter of substantive law a person is entitled to take any name he chooses, so the injunction cannot prevent this. He could, however, prevent her from using, "Mrs." and claiming to be his wife.¹⁷⁹

The most common situation is the one where injunctive relief ordinarily should not be granted. That is where the husband has left the wife, gone through a marriage ceremony with another woman, is now living with her and she holds herself out as "Mrs. X." The first wife seeks to enjoin her from living with him and/or from using the name. These were essentially the facts in *Bauman v. Bauman*,¹⁸⁰ where the husband had obtained a Mexican divorce that the court would not recognize. The court granted a declaratory judgment to the effect that the second marriage was void, because the first was never terminated. It held that this was all the relief she needed and refused to enjoin the parties from living together or holding themselves out as man and wife.

The result is sound. There is some injury to feelings, but it is submitted that it is not the kind the court should protect by injunctive relief, altering the lives of the husband and the other woman. The

176. 105 N.Y.S. 481 (Sup. Ct. 1906).

177. It is interesting to note that the court refused to annul the certificate of marriage between the defendant and the imposter, since that marriage may have been valid. In any event, the plaintiff did not go through the ceremony of marriage.

178. 229 S.W.2d 252 (Mo. App. 1950).

179. See *Queen v. Queen*, 135 N.Y.S.2d 536 (Sup. Ct. 1954), holding that the plaintiff obtaining annulment could not require the woman to resume her maiden name, emphasizing the common law right of a person to choose his name.

180. 250 N.Y. 382, 165 N.E. 819 (1929).

husband and the plaintiff were living apart, and there was no question of reconciliation. No injury could arise to any tangible interest of the plaintiff; there was no showing that she was a victim of impersonation. There was no question of injury to innocent third parties; the husband certainly would be liable for any debts the other woman incurred. The expression, "hell hath no fury like a woman scorned," is applicable here. The injury, if any, to the feelings and sensibilities of the plaintiff occurred upon marital break-up. The increase due to the husband's conduct (predictable at least in the sense that he will be having relations with another) is minimal. It is obvious that the plaintiff is being vindictive, and this is not the type of interest that the law should protect. And where there was no allegation that the husband had gotten a divorce or otherwise put into question the validity of his marriage to the plaintiff, it has been held that the wife is not entitled to a declaratory judgment as to the subsistence of her marriage, even though the husband is living with another woman.¹⁸¹

In *Schneider v. Schneider*,¹⁸² it was the wife who was living with another man. The husband obtained a declaration that she was still legally married to him and sought to enjoin her from using the name of her new lover. Relying on *Bauman*, the injunction was properly denied, the court observing that it could not interfere in such matters. Again, the injury to his feelings at having the wife using the name of another, and even living with him, is minimal when compared to the injury to the plaintiff's feelings upon the wife's leaving him. And in *Bartholomew v. Workman*,¹⁸³ it was held that minor children could not enjoin a woman from claiming that she was married to their deceased father. It is difficult to imagine any real injury to feelings of the type the law should protect. And her merely claiming she was married would not affect any property disputes.

However, where the complaint alleged that the wife had been deprived of employment by reason of the confusion in names resulting from the defendant's conduct in holding herself out as the husband's real wife, it stated an action for injunctive relief.¹⁸⁴ This is an instance where the interference with the personal interest is too insubstantial to justify the granting of injunctive relief, but the effect on economic interests is substantial enough so that the injunction will be granted. It does not appear what happened subsequently. And in *Niver v. Niver*,¹⁸⁵ where the court enjoined the husband and third party from seeking a Mexican divorce,¹⁸⁶ it, as a matter of incidental relief, enjoined them from holding themselves out as man and wife.

181. *Somberg v. Somberg*, 263 N.Y. 1, 188 N.E. 137 (1933).

182. 124 N.Y.S.2d 234 (Sup. Ct. 1953).

183. 197 Okla. 267, 169 P.2d 1012 (1946).

184. *Kray v. Kray*, 169 Misc. 658, 7 N.Y.S.2d 830 (1938).

185. 200 Misc. 993, 111 N.Y.S.2d 889 (1951).

186. The traditional antisuit injunction has frequently been employed to enjoin a spouse from seeking a divorce in another state, where it is clear he is not abandoning the forum as his domicile. See, e.g., *Kempson v. Kempson*, 58 N.J. Eq. 94, 43 Atl. 97 (Chan.

In *Gold v. Gold*,¹⁸⁷ a New York lower court granted an injunction against the use of the name, against their living together and the husband's supporting the third party where he was in arrears in his support payments to the plaintiff. The case has been criticized as an attempt to evade *Bauman*,¹⁸⁸ and the criticism is proper. As the author points out, the wife had an adequate remedy by getting enforcement of a court order for support, and the issuance of the injunction would no more protect her rights to support than the order would. It is impossible to see any causal connection between their living together and holding themselves out as man and wife and the husband's failure to obey a support decree.

It is submitted that the results reached by the courts in most of these cases are sound. Public records should be accurate as to who is whose child and who is married to whom. Moreover, the mental distress upon being known as the father or spouse of someone who does not have that relationship to the plaintiff, could be acute. But when the spouse has "taken another" after leaving the plaintiff, it is difficult to see how the feelings of the plaintiff will be substantially assuaged by having them stop calling themselves man and wife. The real injury occurred when the spouse left the plaintiff and anything else is *de minimis*.

Change of Child's Name

The situation here arises when husband and wife have been divorced and, as is usual, the wife obtains custody of minor children. She remarries and seeks to cause the child to identify with the stepfather rather than the natural father. To accomplish this she calls the child by the stepfather's name and has him registered in school by that name. She may rationalize her conduct on the ground that confusion otherwise results, particularly when the stepfather also has children of the same age level as hers. The natural father objects to this, as he is struggling to have the child identify with him. Parenthetically, it should be observed that the identification problems created for the child are immense. The question is whether the court will enjoin this conduct by the mother.

In *Mark v. Kahn*,¹⁸⁹ the court held that the father was entitled to an injunction. It recognized that an intense personal interest was involved, the right to have the plaintiff's child identify with him. It is more than just a question of which name the child will bear. Rather the father is struggling to have the child identify with him while the mother is try-

1899); *Hammer v. Hammer*, 303 N.Y. 481, 104 N.E.2d 864 (1952). However, the New York courts will no longer issue injunctions against divorces in foreign states, since they do not have presumptive validity and are not required to be recognized under the full faith and credit clause. *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955). The innocent spouse may determine the invalidity of the foreign divorce in a declaratory judgment proceeding.

187. 158 Misc. 570, 287 N.Y.S. 217 (1936).

188. Bennett, *supra* note 11, at 675.

189. 333 Mass. 517, 131 N.E.2d 758 (1956).

ing to estrange the child from the natural father, as she is, and to identify with the stepfather. The name under which the child goes will be a significant factor—particularly in the case of a child of tender years—in determining with whom the child will ultimately identify. The court is merely removing an unfair weapon from the mother's armory. A number of other cases have recognized this interest of the father,¹⁹⁰ and no court to which the problem has been presented has held that the mother arbitrarily may do this.

There are two conditions. First, the father must be contributing to the support of the child. If the father has not shown a father's interest in the child, then he cannot complain if the mother has caused the child to identify with the stepfather, who, presumably is taking this interest. A father who has ignored the child does not have the right to suddenly disrupt the actions of the mother in doing what she believes is best for it. The second is that the injunction will not be granted *unless it is in the best interests of the child*. In *Mark v. Kahn*, the lower court had dismissed the complaint. In reversing, the Supreme Court did not order the issuance of the injunction, but ordered the trial judge to take testimony on whether it would be in the best interests of the child to go under the name of the natural father. The circumstances may be such that going under the name of the natural father would be psychologically and emotionally detrimental to the child.

Thus, in a case such as *Binford v. Reid*,¹⁹¹ where the child had been going under the stepfather's name since he was one year old, the court held it to be in the best interests of the child for him to retain the name. In *Bilenkin v. Bilenkin*,¹⁹² where the daughter had been registered in school in the name of the stepfather from the time of the mother's remarriage, the home of the child was several hundred miles away from that of the father, and the father had delayed in asking for relief, the court refused to require that the child be registered in school under the name of the natural father. In other words, unless the father brings action soon after he discovers that the child is using the name of the stepfather, the court may well find that it is in the best interests of the child to keep the name of the stepfather.¹⁹³ Another qualification is that where the child is at the age of discretion, he can choose the name by which he wants to be known. By this time the conflict in identification is resolved, and there is no need for judicial interference. In *Application of Shipley*,¹⁹⁴ the court held that children aged [eighteen, fifteen, thirteen and eleven] were of the age of discretion.

190. *Degenberg v. McCormick*, 184 A.2d 468 (Del. Chan. 1962); *Solomon v. Solomon*, 5 Ill. App. 2d 297, 125 N.E.2d 675 (1955); *Reed v. Reed*, 338 P.2d 560 (Okla. 1959).

191. 83 Ga. App. 280, 63 S.E.2d 345 (1951). This was a proceeding to legally change the name, but the holding would be equally applicable where injunctive relief was sought.

192. 78 Ohio App. 481, 64 N.E.2d 84 (1945).

193. Note the analogy to laches. Here there has been a lengthy delay and the position of the child has been changed, so to speak.

194. 26 Misc. 2d 204, 205 N.Y.S.2d 581 (1960).

In *Margolis v. Margolis*,¹⁹⁵ the divorced wife who had not remarried was registering the children under her maiden name which she had resumed. The court found that this was not in the best interests of the children and ordered that the children be registered in school and known under the name of the father. This is clearly desirable, as otherwise, doubts as to the children's legitimacy might arise in the minds of others. Many divorced women do not resume their maiden names when they have children so that the children will not have a different name than the mother. And if they are not to have the same name, they should not have the maiden name of the mother because of possible confusion as to their status of legitimacy. An injunction will also lie against the school authorities to require them to register the child in the name of the natural father.¹⁹⁶ The court and not the school board is the final arbiter as to what is in the best interests of the child.

There are no objections of practicability here. The name by which the child is registered in school can be easily checked, and if the child is known around the neighborhood by a different name, this too can be ascertained. The court need not supervise the everyday conduct of the mother, but can merely observe the result and require appropriate action. A different question arises when the husband seeks to prevent the wife and second husband from "alienating the child's affections from him." In the only case in which the question arose, *Reed v. Reed*,¹⁹⁷ the court sidestepped the question by finding that there was no evidence this was being done. Such a decree should never be granted. It is impossible for the court to examine the everyday conduct of people and to interfere in the delicate relationship of mother and child. Alienation of affections can take place in many ways, subtle as well as overt. As long as there is no interference with the visiting rights of the father, he must fight his own battles for the child's affections. If the mother is acting improperly, perhaps a change in custody can be ordered. But the court cannot control the relations between a mother and a child.

The results arrived at in these cases are sound, and represent recognition of an intense personal interest which can effectively be judicially protected.

Parental and In-law Relationships

A few cases have involved the situation where the plaintiff seeks relief from interference with his relationship with his parents or from interference with his relationship with his spouse due to conduct of his in-laws. Here too, the results arrived at are sound and in accord with the capabilities of judicial power. In *Reed v. Carter*,¹⁹⁸ the parties were

195. 338 Mass. 416, 155 N.E.2d 177 (1959).

196. *Nitzberg v. Nitzberg*, 200 Misc. 748, 104 N.Y.S.2d 421 (1950).

197. *Supra* note 190.

198. 218 Ky. 1, 103 S.W.2d 663 (1937).

sisters. Their aged and infirm mother lived with one of them. The parties agreed that the defendant, with whom the mother lived, would not annoy the plaintiff or interfere with her visits to the mother. This agreement was made as part of the settlement of litigation between the sisters. The plaintiff contended that on her last visit the defendant annoyed her and prevented her from conversing with their mother.

The court granted an injunction against such conduct in the future. It said that as long as the mother wished to see the plaintiff, the defendant would be enjoined from interfering. The decree imposes no great restriction upon the home life of the defendant. She need not see the plaintiff if she does not wish to do so. All she has to do is to leave the plaintiff alone when she is visiting the mother. Under the agreement the plaintiff had unrestricted rights to visit the mother. In the absence of such an agreement, the court should impose some limits to the number of visits the plaintiff can make absent emergencies. It is practicable to grant an injunction of this type, and the right to visit one's mother is sufficiently substantial to justify judicial protection.

Interference by in-laws, however, stands on a different footing. It is no secret that parents frequently do not approve of their offspring's choice of a mate—and this disapproval may often not abate upon marriage. Moreover, there would seem to be a natural rivalry between in-laws and spouse for the attention of the spouse's partner and the parents' child. Our obsession with "mother-in-law jokes" may reflect our attempt to gloss over a serious societal problem by laughing at it. This situation is most often before the courts in divorce actions, but on occasion finds its way into a suit for injunctive relief.

In *Devine v. Devine*,¹⁹⁹ the court was presented with a situation of mother-wife rivalry over the son. At the mother's urging (she had always disapproved of the marriage) the son left the wife, joined the Army, and was now stationed in Korea. The plaintiff sought to enjoin the mother from making false statements about her to the husband and from attempting to break up the marriage. The injunction was refused, although the court admitted the wife had no other remedy, since actions for alienation of affections had been abolished. The ground of refusal was impracticability. The court could not prohibit a mother from communicating with her son—it observed that it could not be a "censor of communications." It concluded that enforcement would present "insurmountable difficulties."²⁰⁰ In *Pleet v. Bank*,²⁰¹ the husband sought to enjoin the parents of the estranged wife, who had obtained a divorce in another state (apparently assumed to be void), from inducing the daughter to stay away and from furnishing her with support. The husband had previously recovered damages in an action against the

199. 20 N.J. Super. 522, 90 A.2d 199 (Chan. 1952).

200. The court found that in the past the mother-in-law had harassed the plaintiff by calling her at all hours of the night and hanging up. It found that this conduct, however, had ceased and did not consider whether it should be enjoined.

201. 180 Md. 254, 23 A.2d 700 (1942).

parents for alienation of affections. The court pointed out that parents have a right to counsel and support children even if married,²⁰² and emphasized the difficulty of enforcement.²⁰³

In both of these cases the courts realized the limits of judicial power. The court cannot interfere in the relationships between parents and children and cannot put judicial power on the side of the spouse. If parents feel the child has made a bad marriage, the court should not prevent them from persuading the child to that effect. Moreover, the court cannot take the time, nor should it, to make sure the parents are using "fair means." Spouse-in-law relationships are simply too delicate for the injunctive process to touch. Unlike *Reed v. Carter*, a permissive order only is not sought. The court cannot regulate the conduct of a parent with respect to his child, and if the spouse cannot successfully compete with the parent, his remedy lies in a divorce proceeding.

Illicit Relationships With Third Parties

Here we will discuss the availability of injunctive relief to a plaintiff whose spouse is engaged in illicit relationships with third parties or otherwise subjected to alienation of affection from the plaintiff or a parent whose child is engaged in such a relationship. The great number of cases involve spousal relationships, and research has only disclosed one case involving a seduced child.

In *Ex parte Warfield*,²⁰⁴ the court enjoined the defendant from associating with the plaintiff's wife and speaking or writing or communicating with her in any manner. The complaint alleged that the defendant had succeeded in partially alienating the wife's affections and if not restrained, would succeed in alienating them fully, destroying the marriage. The defendant violated the injunction, and release on habeas corpus was denied. The court held that there was no other adequate remedy to protect the marriage—damages would obviously have been inadequate—and thus the court had the power to issue the injunction.²⁰⁵ In *White v. Bauderer*,²⁰⁶ the plaintiff's wife was the defendant's secretary. She was suing the plaintiff for divorce, which he was resisting. The defendant carried on with the wife openly and taunted the plaintiff about this. Interestingly enough, the court found that adultery had not been committed. Here the injunction ordered the defendant not to have anything to do with the plaintiff's wife "except as related to her duties as his employee." The court did not say how this decree was to be enforced or establish criteria as to what

202. It may be asked why this right was not a defense to the action to recover damages for alienation of affections.

203. The court also went on to say that "equity protects only property rights," and found that consortium was not a property right.

204. 40 Tex. Crim. 413, 50 S.W. 933 (1899).

205. The court implied that the statute removed its discretion to refuse injunctive relief when the plaintiff showed violation of a substantive right for which damages would be inadequate.

206. 255 S.W. 1016 (Tex. Civ. App. 1923).

would constitute prohibited conduct. For example, if she came to work one day crying because her husband had abused her, would the defendant's comforting her and telling her everything was the husband's fault, constitute an attempt to alienate her affections or would it be an attempt to enable her to efficiently perform her duties as an employee? Or would a "pat on the behind" (a common practice in many offices) be a friendly gesture toward an employee or an attempt at alienation of affections and seduction? The court did not attempt to answer these questions nor could it. But they point out the difficulty in trying to regulate relations between people by judicial decree.

The Alabama courts have also held that such conduct can be enjoined. In *Henley v. Rockett*,²⁰⁷ the court ordered the defendant to stop receiving gifts from the plaintiff's husband, from visiting and associating with him, from meeting him clandestinely, from going on trips with him, or from doing any act tending to interfere with his giving the plaintiff the companionship to which she was entitled. This was a May-December situation. The husband was sixty-four years old, had just retired and the evidence indicated he had started to drink a great deal. The defendant was thirty-six. The court attributed his conduct to his drinking and observed that putting a stop to the affair might "open the way for his mastery over the drinking habit."²⁰⁸ The parties were neighbors, and the court held that the decree did not affect the "defendant's right to speak to him as a neighbor." It observed that she knew what was proper deportment. This is an attempt to answer the type of objections that were raised in the preceding paragraph. Still, this overlooks the fact that the wife would have an entirely different view of proper deportment than the defendant. The problem would be that anytime there was contact between the defendant and the husband, the wife might seek a judicial determination as to whether her deportment was "proper." For example, the defendant is sunning herself in an abbreviated costume, and the husband saunters over. It is not difficult to see the wife appearing in court on a motion to cite the defendant for contempt, alleging that she "flaunted herself in front of him," attempting to alienate his affections. Could she ask the husband to "take something out of her eye" or would this involve his getting too intimate with her? In all such cases the court risks acting beyond the range of its effective power when it attempts to regulate the intimate personal conduct of people.²⁰⁹

The majority of the courts before whom the question has come have recognized the limitations on judicial power. The leading case taking

207. 243 Ala. 172, 8 So. 2d 852 (1942).

208. Damage actions for alienation of affections had been abolished. The court held that the statute did not prohibit the granting of injunctive relief.

209. See also *Latham v. Karger*, 267 Ala. 433, 103 So. 2d 336 (1958), where the court affirmed the principle of *Henley* and held that a cause of action for injunctive relief would lie. It had been contended that the court should abandon the granting of such relief in view of the actions taken by other states.

this position is *Snedaker v. King*.²¹⁰ The plaintiff sought to enjoin a "vamp" from alienating the affections of her husband. The lower court enjoined the defendant from visiting or associating with the plaintiff's husband, going near him or to any place where he might be, writing or communicating with him in any manner, and doing anything to prevent his giving the plaintiff the full love, affection and the like to which she was entitled." The court in a *per curiam* opinion reversed, characterizing the decree as an "extreme instance of government by injunction." It pointed out that the plaintiff had adequate statutory remedies to obtain support for herself and the children, and that there was no evidence the husband had failed properly to support them. Very succinctly it summed up the objections to an injunction here:

Such extension of the jurisdiction of equity to regulate and control domestic relations, in addition to legal and statutory remedies already provided, in our opinion, is not supported by authority, warranted by sound reason, or in the interest of good morals or public policy. The opening of such a wide field for injunctive process, enforceable only by contempt proceedings, the difficulty if not impossibility of such enforcement, and the very doubtful beneficial results to be obtained thereby, warrant the denial of such a decree in this case. . . .²¹¹

In a concurring opinion, Judge Allen, a woman incidentally, pinpointed three telling arguments against the issuance of an injunction. First, the order would be unusually difficult of enforcement. In the ordinary injunction there is the prohibition against the doing of some act which will involve an *indifferent third party*. Here proof of a violation would depend largely upon the testimony of two people, who rather than being indifferent, are intimately involved with each other. She observed that it would be difficult to see how the injunction could be enforced without "permanently attaching a probation officer to both." Secondly, the order restrained all contact between two people, which is impossible. As she observed:

Under this order, what is Miss Snedaker to do if she passes King upon the street? Must she cross the street in order not to go "near him . . . at . . . any . . . place where said Homer King may be," or may she stay upon the same side of the street and pass him? Under such circumstances may she say "good morning" to him, or in so doing will she be violating the order that she is not to communicate with King "by word"?²¹²

We have previously given other examples of this type of situation. And whether or not the defendant knows what is prohibited of her, the plaintiff may still be in court demanding contempt every time there is some contact, however innocent. The amount of judicial time that could be taken up in superintendence is unlimited.²¹³ Thirdly, she

210. 111 Ohio St. 225, 145 N.E. 15 (1924).

211. 145 N.E. at 17.

212. *Ibid.*

213. See the discussion in Moreland, *supra* note 11, at 211.

pointed out that the injunction would merely add "fuel to the flame." This would make the wrongdoer even "more alluring to the husband." We can see from the experience of Prohibition the effect of trying to stifle normal instincts of people and the "forbidden fruit" mentality that results.

To these objections I would like to add two others. First, the issuance of such a decree causes disrespect for the legal processes, because it is not likely to be obeyed. It is one thing to order a person to deliver a ton of coal, or to cease trespassing on real property, or even to leave a person alone; it is another to tell him that he cannot see a person whom, for one reason or another he thinks he "loves," and with whom he has probably been physically intimate. The needs involved may reflect deep-seated, psychological problems, which are immune to judicial control. Moreover, the parties probably believe they can violate the decree and remain undetected. All the decree means is that their meetings will be clandestine. The injured spouse may resort to private detectives. If they are successful in avoiding detection, as they may be, then they and those who are familiar with the situation will have lost respect for the law. In any event, the public may well wonder why the courts are concerned with matters such as this when automobile injury cases, involving perhaps permanent and serious injuries, are delayed for trial three or four years.

Finally, and what to the writer is most significant, is the fact that he finds it difficult to believe that the plaintiff is "free from fault." Absent real psychological problems—in which case an injunction is likely to be ineffective anyhow—we can ask whether a happily married person is likely to have his "affections alienated." Will the husband who has a devoted and loyal wife, be "seduced by a vamp"? Of course people fantasize. The middle-aged businessman may imagine himself surrounded by a bevy of beautiful and scantily clad chorus girls, but I doubt if he would leave his wife to live with one. This is not to say that he may not occasionally stray in action as well as thought, but that is a different thing from leaving the wife. The housewife, surrounded by dirty diapers and dishes, may imagine herself transported away by a "Prince Charming." But if confronted with the situation, I cannot picture her leaving the dishes and diapers.

Rather, is not the situation, despite allegations to the contrary, one where the plaintiff has not himself shown the spouse the love and affection he or she needs? Has the plaintiff husband satisfied the wife's need for a companion and lover? Has the plaintiff wife "let herself go to pot" after marriage and come to look upon her husband as a "meal ticket"? It would seem that when affection has been alienated to the extent that an injunction is sought, the marriage can no longer be preserved and is not worth preserving in any event. Where the plaintiff has lost his spouse to a rival, should he be able to obtain the court's coercion to preserve the marriage? Should he be entitled to fail to satisfy the needs

of the other spouse and then use the judicial processes to force the spouse to associate only with him?

Marriage does not involve the concept of "chained for life." Irrespective of the liberality of divorce laws or even whether a divorce is sought, the fact remains that some marriages work and others do not. Marriage is probably the most intimate relationship we know. Its success or failure depends on many intangibles, on everyday actions, on consideration and ultimately on affection. Where a person cannot obtain the affection he needs and desires from his spouse, he may very well seek to obtain it from others. The "guilty person" is less likely to be the third party than the plaintiff who is now seeking judicial relief. Would a normal person enjoying a happy home life—absent psychological problems that cannot be altered by a judicial decree—be likely to forsake a spouse he loves for an illicit relationship with a third party? The plaintiff spouse has—or had—an adequate remedy: that of acting properly and considerately and supplying the affection that the spouse must now seek elsewhere.

Professor Bennett has effectively demonstrated the soundness of this approach. He has observed:

The *Snedaker v. King* decision focuses attention on the real problem in this group of cases—the practicability and social desirability of attempting to enforce matrimonial harmony by injunction. As a matter of fact injunctive relief is seldom sought except in a spirit of jealous retaliation. A plaintiff who drags the family name and reputation through the muck of sordid publicity attending such an action can scarcely entertain any genuine hope for domestic rehabilitation. Such is the perversity of human nature that the injunction, if granted, will almost inevitably drive the prodigal husband away from, rather than toward, the loving embraces of the legally victorious wife. Then, too, many domestic triangles are traceable to deep-rooted family difficulties and incompatibilities, or to an inborn infidelity on the part of the wayward spouse, rather than to the opportunities of any particular adventures. Though the court may say "hands off" to the present recipient of the misdirected affections, it cannot effectively say, "love your wife" to the erring spouse.²¹⁴

In other words, the law can formulize the marriage relationship or terminate it, but it cannot preserve it, since such preservation depends on too many intangibles and intimacies beyond judicial control. In refusing to enjoin such conduct the courts have emphasized the impracticability of enforcement of the decree.²¹⁵ It has also been observed that the proper remedy for the offended spouse is a divorce.²¹⁶ This recognizes the inability of the law to preserve the marriage relationship.

In *Pashko v. Pashko*,²¹⁷ an Ohio court, despite the holding of *Sned-*

214. Bennett, *supra* note 11, at 671.

215. *White v. Thompson*, 324 Mass. 140, 85 N.E.2d 246 (1949); *Rose v. Aaron*, 345 Mich. 613, 76 N.W.2d 829 (1956). See also *Diamond v. Diamond*, 372 Pa. 562, 94 A.2d 569 (1953), where the wife sought an injunction only against the commission of adultery, which was refused.

216. *Hadley v. Hadley*, 323 Mich. 555, 36 N.W.2d 144 (1949).

217. 101 N.E.2d 804 (Ohio C.P. 1951).

aker v. King, granted an injunction temporarily restraining the parties from seeing each other. The wife had brought an action for separation and alimony against the husband. The court said that it had a duty to attempt to reconcile the parties and observed that there was a six week waiting period before a divorce action or one for permanent alimony could be heard. It concluded that this represented a policy of attempting a reconciliation. Nonetheless, the objections in *Snedaker* are equally applicable here. This decree will not achieve a reconciliation for the simple reason that it probably will not be obeyed. A contrary result was reached in *Pearce v. Pearce*,²¹⁸ where the order accompanying the interlocutory divorce decree restrained the wife from seeing her paramour until the decree became final. The court held this was unenforceable and was too great a restraint on the wife's liberty.

In *Knighton v. Knighton*,²¹⁹ the Alabama court refused to apply the holding in *Henley v. Rockett*, to a situation where the plaintiff and her husband were no longer living together. There the wife was seeking separate maintenance, which caused the court to conclude that the injunction would be in vain. It is submitted that it is no more effective when they are still living together. Where affection has ceased, it cannot be rekindled by judicial decree, and where the situation is such that one party feels he must resort to injunctive relief, it is as if they had ceased living together. As a practical situation, they are roomers together rather than man and wife. *Knighton*, however, does represent a realization of the fact that affection cannot be restored by the court. The only difference between this and the other cases is the court's opinion as to the time when this takes place.

A situation where a restraint on association is practicable and sound occurred in *Aubry v. Aubry*.²²⁰ The court had found that neither divorced parent was a fit person to have custody of the child and gave it to the husband's mother. The natural mother had visitation rights. The decree required that when she had custody she was not to be in the company of her paramour, whom the court characterized as responsible for the marital break-up. Here there is no attempt to interfere with the relationship. The restraint is partial and desirable from the standpoint of the child. His interest and the fact that the decree is more likely to be obeyed—the child could probably report a violation—makes the issuance of the injunction practicable.

In *Stark v. Hamilton*,²²¹ the court dealt with the issue of whether an injunction should be issued to restrain a third person from associating with a minor. The defendant had induced the plaintiff's daughter to leave her parents and live with him in adultery. The court ordered him to bring the child back to her parents' home and to refrain from associ-

218. 37 Wash. 2d 918, 226 P.2d 845 (1951).

219. 252 Ala. 50, 41 So. 2d 172 (1949).

220. 26 Wash. 2d 69, 173 P.2d 121 (1946).

221. 149 Ga. 227, 99 S.E. 861 (1919).

ating with her. Here it is submitted the result is correct. It may not be too late for the injunction to have some effect. The court does have a special responsibility to protect children.²²² More significantly, the emotional involvement is not as intense as in the spouse-paramour situation. The minor may have been infatuated with the defendant, and assuming proper parental control, this infatuation is more likely to be eliminated than in the case of the spouse.²²³ While the defendant's psychological problems may be such that he will not obey the injunction, still, if they are not that serious, his degree of involvement may not be such as the adult lovers. In any event, the immaturity of the child—the basis for many rules of law relating to minors—justifies the making of the judicial effort.

In dealing with family relationships the courts must recognize the limitations to their power. They must also recognize the intensity of the relationships. This is relevant both as to the granting of relief and the refusal to do so. Where enforcement is practicable, such as in the case of changing of a child's name, the father's feeling for his child and the desire to have the child bear his name justify the granting of injunctive relief. But in the alienation of affections situation the intensity of relationships and the spouse's estrangement from the plaintiff makes the granting of relief impracticable. In other words, judicial power should be employed to enforce a person's interest in these relationships except where the nature of the relationship is such that its preservation is beyond the ken of judicial power.

THE RIGHT TO BELONG

The issue here is under what circumstances the court will order reinstatement²²⁴ of membership when a person has been improperly expelled from an association of which he is a member.²²⁵ Leaving for the moment the question of what constitutes improper expulsion, there is the question of what kind of association must be involved before the court will consider whether the expulsion was improper. When the courts were operating under the notion that "equity protected only property rights,"²²⁶ it was necessary to show a "property right" in the association. This did not necessarily mean that the association was one to which the plaintiff belonged for economic reasons such as a trade

222. See the discussion of this point in Moreland, *supra* note 11, at 220-24.

223. See the discussion of this point in Bennett, *supra* note 11, at 673.

224. Ordinarily injunctive relief is sought, but some courts have held that mandamus is the proper remedy. See Bernstein v. Alameda-Contra Costa Medical Association, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); Costa v. La Luna Servante, 255 Ala. 6, 49 So. 2d 672 (1950); Monroe v. Colored Screwmen's Benevolent Association, 133 La. 893, 66 So. 260 (1914).

225. We are not concerned with the substantive right to *become* a member of an association. Obviously, if such a right were recognized, injunctive relief would be proper, as damages could not be measured for the deprivation.

226. The classic article is Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930). See the discussion of the technical property right requirement at 999-1001. Interestingly enough the author said he did not foresee its abandonment.

association. It could be legitimately contended that the courts should not become involved in membership hassles, that the right to belong to an association is not sufficient to warrant judicial protection, but that such protection should extend only to economic interests which depend on organizational membership. But this is not the tack the courts have taken. If a technical property right could be found, full protection would be extended; in the absence of such a property right, no protection would be given, even though as at least one case will indicate, real economic interests were affected by membership in the association.

The fallacy of the requirement of a technical property right is best demonstrated by the holding in *Baird v. Wells*,²²⁷ that a member wrongfully expelled from a proprietary club cannot obtain injunctive relief ordering reinstatement. Since the member had no rights to a share of the assets upon dissolution, there was no property right. But if the club were organized in such a manner that the membership had a right to the assets upon dissolution, then there would be a property right and injunctive relief would be available, as the court pointed out. In either instance, however, the interest of the member is in the associational relationship and not the assets.²²⁸ A member does not join a club in the hopes of sharing in the assets upon dissolution. Rather he joins it for the social companionship, the prestige of belonging and other intangible factors. Thus, the question of a right to the assets upon dissolution—a circumstance which the member hopes will not occur—is irrelevant in determining whether injunctive relief should be available. Even though damages may be available for wrongful ouster,²²⁹ they are obviously inadequate because of the intangible nature of the interest involved.²³⁰ If injunctive relief is not granted, the associational interest, which is what the member is really trying to protect,²³¹ is destroyed.

In *Wellenvoss v. Grand Lodge, Knights of Pythias of Kentucky*,²³² for example, the plaintiff was elected by a subordinate lodge to be a delegate to the grand lodge, apparently a form of permanent membership in the latter body, which was a great honor. The court held that no property rights were involved. The delegate had no interest in the assets of the grand lodge, and the subordinate lodge would lose no money if he were not a delegate. This ignores the fact that the interest involved was the right to belong and that the question of assets was irrelevant on this issue.²³³

227. Law Reports, 44 Chan. Div. 661 (1890).

228. See the discussion of this point in de Funiak, *supra* note 11, at 26.

229. See the result in *The Bath Club Case*, 70 Sol. J. 828 (1926).

230. Professor Chafee has contended that damages should not be recoverable for the wrongful ouster, but only for such denial of pecuniary rights such as sick benefits. Chafee, *supra* note 226, at 1010-13. He says that if damages are recoverable against the whole group, this will penalize members who voted against the expulsion.

231. This is not to say that there may not be intangible economic benefits, e.g., the opportunity to meet clients.

232. 103 Ky. 415, 45 S.W. 360 (1898).

233. See also *Gaines v. Farmer*, 55 Tex. Civ. App. 601, 119 S.W. 874 (1909), where the

The more realistic view is that taken by the court in *Berrien v. Pollitzer*.²³⁴ The plaintiff was a member of the National Women's Party, a non-stock, non-profit corporation established to obtain equality for women. She claimed she was wrongfully expelled and sought an injunction restraining the officers from denying her the use of the organization's facilities. The court held that it could protect personal rights and hence did not have to find a technical property right. The real interest was associational membership, which it would protect. In *Randolph v. First Baptist Church of Lockland*,²³⁵ the court enjoined the wrongful expulsion of a member from a church congregation. It found that there was a right to share in the assets upon dissolution, which satisfied the requirement of a technical property right. However, it took the position that even absent this, it would grant the injunction to protect the personal interest, which it recognized as the real interest that was involved.

On the other hand, most of the cases where a property right has been found have involved associations where there was a *substantial economic interest* in addition to or often instead of, any associational interest. One situation is where the association offers sickness and death benefits, or insurance programs, as do many fraternal societies. Thus, whenever there are sums of money that will be payable to members upon the happening of certain contingencies or at a certain time, the courts unhesitatingly hold that they will consider whether the expulsion was wrongful.²³⁶ The other situation is where the organization is a labor union or trade association. Professor Chafee has referred to this as the "strangle hold" policy.²³⁷ A person who is expelled from a trade union cannot obtain work where the employer is under the closed or union shop.²³⁸ If an apprentice is expelled from a craft union, he may never be able to learn the trade. Here the courts are protecting economic interests, and any associational right is incidental.²³⁹ The same is true of trade associations. A person generally joins these not so much for social intercourse with the other members (often his competitors) but for the economic benefits that can be derived from such membership. Examples of such associations would include a board of trade²⁴⁰ or an

court refused to determine title to office in an unincorporated association, where the position was unsalaried.

234. *Supra* note 26.

235. 120 N.E.2d 485 (Ohio C.P. 1954).

236. See, e.g., *Free Masons v. Valentine*, 134 Md. 505, 107 Atl. 531 (1919) (burial funds and widows allowances); *Von Ark v. San Francisco Gruetli*, 113 Cal. 377, 45 Pac. 685 (1896) (life insurance); *Mesisco v. Giuliana*, 190 Mass. 358, 76 N.E. 907 (1906) (sick benefits).

237. Chafee, *supra* note 226, at 1022.

238. This is limited to a situation not pre-empted by federal legislation. Where federal law is involved, a person who has paid his dues and initiation fees cannot be deprived of work under a union shop arrangement, even though he is otherwise expelled from the union.

239. For cases holding that the courts would consider the validity of an expulsion from a labor union, see e.g., *Holmes v. Brown*, 146 Ga. 402, 91 S.E. 408 (1917); *Krause v. Sander*, 66 Misc. 601, 122 N.Y.S. 54 (1910); *Heasley v. Operative Plasterers International Association*, 324 Pa. 257, 188 Atl. 206 (1936).

240. *Ryan v. Cudhay*, 157 Ill. 108, 41 N.E. 760 (1895).

association of automobile dealers that put on exhibitions of new models.²⁴¹

Where the concept of property right has caused an undesirable result has been when the court did not find a technical property right, but the association did offer substantial economic benefits. In *Weyrens v. Scotts Bluff Medical Society*,²⁴² the plaintiff, a physician, was ousted from the county medical society for violating a rule prohibiting members from doing work for indigents at reduced rates. There were no assets as to which the member had a right, so the court held that the absence of a property right precluded judicial relief. Without membership in the association, however, the plaintiff could not practice at the only hospital in the county having facilities permitting surgery in the field in which the plaintiff specialized! The court held that this was at most "an inconvenience," but that there was no property right in the association, and thus refused relief.²⁴³ The court failed to distinguish between a technical property right and substantial economic interest. The association had a "strangle hold" on medical practice, and the ouster substantially interfered with the plaintiff's opportunity to practice his profession and to make a living. The acme of absurdity and mechanical jurisprudence is reached when a party would be entitled to judicial relief if he had a right to a share of assets in the unlikely event of dissolution, since he has a "property right," but is not when the association is such that the practice of his profession in that area depends on membership in the association.

A contrary result was reached in *Bernstein v. Alameda-Contra Costa Medical Assoc.*,²⁴⁴ where a physician also was expelled from a county medical society. The court, in holding that judicial relief was available, said that it was not necessary that there be a property right, since there was a contractual right. The result is sound, but the reasoning is not, since in every membership situation there can be found to be a contract between the members.²⁴⁵ Calling the relationship a contractual one evades the real issue—is this the type of interest that the courts will protect?²⁴⁶

The type of interest involved is the crux of the matter. Basically there are two reasons a person joins an association: to obtain economic advantage or to enjoy social, spiritual or other intangible relationships.²⁴⁷ The question should be whether the courts will protect either

241. *Strong v. Minneapolis Trade Association*, 151 Minn. 406, 186 N.W. 800 (1922).

242. 133 Neb. 814, 277 N.W. 378 (1938).

243. An alternative ground may have been failure to exhaust remedies within the association, but the court indicated that the relief would be refused in any event because of the absence of "property rights."

244. *Supra* note 224.

245. The contractual theory as a justification for the granting of relief has been criticized as unnecessary. Pound, *supra* note 10, at 680; Chafee, *supra* note 226, at 1001-06. Professor Chafee also maintained that this analysis would tend to obscure the real issues.

246. We will not be concerned with modern "key" clubs, which really involve contracts for the furnishing of potables and entertainment rather than club membership.

247. Note that both economic and intangible benefits can be present in the same association.

or both of these interests by the injunctive process. The issue of the existence of a property right is an irrelevancy. Since we have always protected economic interests, there is no reason why we should not protect them when they are represented by membership in an association. The cases are sound insofar as they protect the rights to employment, commercial advantage, death benefits, insurance and the like. Abandonment of the "property right" concept will prevent unsound results as in the *Weyrens* case. Whenever a substantial economic interest is involved in membership in an organization wrongful expulsion should be enjoined.

The personal interest in belonging stands on a different footing. It may be asked whether the judicial machinery should be employed to protect this interest. The injury to feelings is not likely to be as intense as that involved in the cases involving family relationships, the right to be let alone or good reputation. Still, it should be protected *when, it is practicable to do so*. In some of the cases where relief has been denied because of the absence of a property right, the denial of relief could have been justified on other grounds. Such a case is *Kaufman v. Plank*.²⁴⁸ The plaintiff was a member of the Mennonite Church, who had refused to obey a church ruling. As a result he was "mitred," which meant that no one could associate with him. He sought an injunction requiring the lifting of the ban, which the court refused on the ground that no property right was involved. A sounder reason would have been that the court should not interfere in the relations between a church and its members if it can possibly avoid it. The court in that case did note that it must observe the boundary between church and law when the only issue is whether a person is entitled to membership. Professor Chafee has characterized this as the "dismal swamp policy."²⁴⁹ Where the court gets involved with religious organizations, it must master a new terminology and body of rules, and if it errs it has interfered with the autonomy properly belonging to a religious body. The nature of the church organization may be such that the courts cannot decide the question of whether expulsion was proper. Where the church is organized on a parochial basis such as the Roman Catholic Church, and the rights of members are covered by a body of Canon Law, the courts cannot hope to interfere without using up an enormous amount of judicial time, as well as possibly interfering with the free exercise of religion.²⁵⁰ The same reasoning would hold true in the case of a group such as the Mennonite Church.

Where there is a dispute over church property, it may be necessary for the court to decide these questions so that the church can continue to function.²⁵¹ Even in such a situation most courts will accept as

248. 214 Ill. App. 306 (1919).

249. Chafee, *supra* note 226, at 1023-26.

250. See the discussion in Chafee, *id.* at 1025 as regards interference with the Roman Catholic Church.

251. But see *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North*

conclusive a ruling by the authorized church tribunal if one is available.²⁵² It need not "get into the thicket" if the only question is whether a particular member has been treated properly by the church. This reasoning is inapplicable, however, when the church is organized on a congregational basis, and the only question is whether the congregation of which the person is a member has acted properly. In that situation the court should hear the case unless a question of ecclesiastical law that is too complicated to resolve is involved. In *Randolph v. First Baptist Church*,²⁵³ the court merely had to construe a state charter and took jurisdiction. On the other hand, in *Minton v. Leavell*,²⁵⁴ the plaintiff sought to restrain the church officials from ousting him for failure to sign a church covenant, claiming that the pastor had no authority under church law to create such a covenant and require members to sign it. The issue would involve questions of church law, and the court refused to resolve it because of the absence of a property right.²⁵⁵ The results in these cases should depend on whether the court must construe complex questions of ecclesiastical law and not on whether the member has a right in the assets of the congregation.

On the other hand, where the question has been resolved by higher authority the court should order reinstatement irrespective of whether a technical property right can be found. In *Connelly v. Masonic Mutual Benefit Association*,²⁵⁶ the issue was whether a party had been wrongfully expelled from a Masonic order.²⁵⁷ This is the type of organization whose rules of membership are extremely complex, and in a suit for reinstatement the court could properly refuse to take jurisdiction. But here the Grand Master—the highest organizational official—had ruled the party was not properly ousted and the court had only to follow this ruling. Again, the question should be whether the court can effectively resolve the question rather than whether there is a property right. There is no need for the court to hide behind the screen of "no property right"; instead it can truthfully state why it cannot give relief.

The other reason that may justify hesitation to protect the associa-

America, 344 U.S. 94 (1952), where a legislative determination that one group was entitled to control of church property was held to be unconstitutional.

252. The majority rule was established in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1869). Accord as to the Masonic order: *Connelly v. Masonic Order*, 58 Conn. 552, 20 Atl. 671 (1890). *Contra*: *Boyles v. Roberts*, 222 Mo. 613, 121 S.W. 805 (1909).

253. *Supra* note 235.

254. 297 S.W. 615 (Tex. Civ. App. 1927).

255. See also *Gibson v. Singleton*, 149 Ga. 530, 101 S.E. 178 (1919), where the court refused to enjoin the enforcement of a congregation's requirement that each member be required to pay a fee in order to vote for trustees. The plaintiff contended that under church law this requirement was illegal. The court held that no property rights were involved and refused to grant relief.

256. *Supra* note 252.

257. The case involved an action by a widow for death benefits, and the issue was whether her husband was a member at the time of death. There would have been no difference in result if the suit were one for reinstatement.

tional interest is the fear the disgruntled parties may use the courts to resolve a dispute with the association without being concerned with the protection of their associational interest. The answer to that objection is to refuse relief unless the court finds the member is genuinely interested in reinstatement. In *Angland v. Doe*,²⁵⁸ a plaintiff came before the court that decided *Berrien v. Pollitzer*, seeking a declaratory judgment that a club had acted wrongfully in accepting his undated resignation given two years earlier. He failed to ask for reinstatement. The court held the complaint should be dismissed on the ground that it was not the function of the court to decide whether the club acted wrongfully unless the member wanted to protect his interest in the associational relationship.

In summary, the concept of property right as a requirement for injunctive relief serves absolutely no utility and causes some harm. Where the member seeks membership either to protect economic interests or his interest in the associational relationship, the court should grant relief unless, because of the nature of the association and the problems in determining the issue of wrongful expulsion, it would be impracticable to hear the case. It should also be noted that a member cannot obtain judicial relief until he has exhausted all his remedies within the association²⁵⁹ unless to do so would be futile.²⁶⁰ This requirement will prevent the court's being used as the forum to determine these disputes initially, and many may be settled on the associational level without judicial interference.²⁶¹

Now that we have considered when the court will protect this interest, we must consider the grounds on which the court will find the expulsion unlawful. The grounds may be classified as those relating to procedure and those relating to the substantive grounds of expulsion.²⁶² The court obviously cannot decide whether the other members should want to keep the plaintiff as a member. It can only examine if the proper procedure was followed in ordering expulsion and if the substantive grounds of expulsion are so unreasonable as not to be judicially recognized.

As to proper procedure the first requirement is that the association must have followed its own by-laws and rules. In this connection the contractual nature of the associational relationship becomes significant. Thus, in *Free Masons v. Valentine*,²⁶³ where the organizational rules provided for trial prior to expulsion, a member expelled without

258. 263 F.2d 266 (D.C. Cir. 1958).

259. *Moody v. Farrington*, 227 Ill. App. 40 (1922); *Snay v. Lovely*, 276 Mass. 159, 176 N.E. 791 (1931); *Peters v. Minn. Dept. of Ladies of Grand Army of the Republic*, 245 Minn. 563, 73 N.W.2d 621 (1955).

260. *Heasley v. Operative Plasterers International Association*, *supra* note 239; *Washington Local Lodge v. International Brotherhood*, 33 Wash. 2d 1, 203 P.2d 1019 (1949). It is interesting to note that the facts in the *Heasley* and *Lovely* cases were essentially the same, the only opportunity for appeal being at the next convention two years hence.

261. See the discussion of this point in Chafee, *supra* note 226, at 1019.

262. Professor Chafee analogizes this to due process. *Id.* at 1015-16.

263. *Supra* note 236.

such a trial was entitled to an injunction ordering reinstatement.²⁶⁴ But this right can be waived. So where the by-laws provided for a hearing before the grievance committee, but the plaintiff admitted that the charges were true, it was held he waived this right, and reinstatement was not ordered.²⁶⁵

The court, however, will order reinstatement if it considers the procedure under which the member was expelled fundamentally unfair.²⁶⁶ In *Von Ark v. San Francisco Gruetli*,²⁶⁷ the by-laws of the association made no provision for a notice and hearing. The court held that the absence of notice and hearing rendered the expulsion illegal and ordered reinstatement. The same result was reached in *Washington Local Lodge v. Int'l Brotherhood*,²⁶⁸ both as to expulsion of individual members and expulsion of a local union from the national. In *Falls v. Musicians Protective Union*,²⁶⁹ the court found that the union did not give the plaintiff proper notice of the charges, continued a meeting while he was absent, and held a meeting involving him on Sunday. This was found to be improper procedure and reinstatement was ordered. And in *Ryan v. Cudhay*,²⁷⁰ the court held that the association's failure to permit the plaintiff to introduce evidence of his innocence rendered the proceedings unfair, and it ordered reinstatement.

On the other hand, it is obvious that strict legal proceedings are not required. The association can adopt the method it believes best calculated to determine the truth of the charges so long as the member has a fair opportunity to present his case.²⁷¹ The notice of the charges need not be the same kind as would be given in a judicial proceeding.²⁷² The member is not entitled to be represented by an attorney unless this is provided in the by-laws.²⁷³ There need be no adherence to formal rules of evidence,²⁷⁴ nor would it seem that the organization is prohibited from requiring him to answer the charges a second time unlike the situation of a criminal defendant.²⁷⁵ Finally, a change in the procedure subsequently to the time the plaintiff becomes a member, such as trial before a board instead of the entire membership, is not unfair.²⁷⁶ In other words, so long as the organization follows its

264. See also *Richards v. Morison*, 229 Mass. 532, 118 N.E. 868 (1918); *Krause v. Sander*, *supra* note 239.

265. *Monroe v. Colored Screwmen's Benevolent Association*, *supra* note 224.

266. The "fundamentally unfair" doctrine may be somewhat analogous to the dual standard applicable under the due process clause to state and federal criminal procedure. See also the discussion in *Chafee*, *supra* note 226, at 1019-20.

267. *Supra* note 236.

268. *Supra* note 260.

269. 40 R.I. 34, 99 Atl. 823 (1917).

270. *Supra* note 240.

271. *McConville v. Milk Wagon Drivers Union*, 106 Cal. App. 696, 289 Pac. 852 (1930).

272. *Peters v. Minn. Dept. of Ladies of Grand Army of the Republic*, *supra* note 259.

273. *Richards v. Morison*, *supra* note 264.

274. *Chafee*, *supra* note 226, at 1016.

275. *Ibid.*

276. *Schulz v. Supreme Tent, Knights of Maccabees*, 236 S.W. 903 (Mo. App. 1922).

own rules, and the member is given adequate notice, and an opportunity to be heard and to present his case, he has been given procedural fairness. This approach is very sound and properly accommodates the right of the member to fairness and that of the association to decide how it wants to determine when expulsion is proper.

When the court deals with substantive grounds of expulsion, it must tread most delicately lest it interfere with the very basis of the associational relationship—the union of individuals for common purposes. Professor Chafee has pointed out that a member may give up certain rights by joining an association which he regains only upon resignation.²⁷⁷ He gives the example of a member of a Republican club who runs for office on the Democratic ticket. If it is held improper to expel him on those grounds, the very purpose of the organization will have been defeated. He also points out that by becoming a member of certain organizations the member knows full well that he is submitting to autocratic rule and when he enters the organization on those terms, he cannot later complain that he has been wrongfully excluded. He gives the example of a prophet who has established a religious community and who demands strict adherence to his discipline by the members. A modern example would be the John Birch Society, whose program and rules have been established by a single individual. When the courts have held ouster unjustified has been where the right the organization claims to have been waived is of a very substantial nature and the member's exercise of that right would not destroy the purpose for which the organization exists.

The leading case holding an expulsion improper because of the substantive ground assigned is *Spayd v. Ringing Rock Lodge*.²⁷⁸ There by-laws of a railroad union prohibited a member from supporting legislation opposed by the union or opposing legislation supported by it. The plaintiff signed a petition supporting legislative review of the Full Crew Act in Congress, which the union opposed. He was given a fair hearing and when the violation was established, he was expelled. The court ordered reinstatement on the ground that the by-law was unenforcible as an attempt to abridge the member's right of petition. It stated that the right of petition was not waived by joining a union. The union can continue to operate as a labor union, even though an individual member speaks out against a position taken by the union. On the other hand, one of the prime purposes, indeed the most significant one, of a labor union is to bargain collectively. When a member refuses to abide by the collective bargaining agreement, his action operates to destroy the prime purpose for which the union was formed. Thus, in *Flynn v. Brotherhood of Railroad Trainmen*,²⁷⁹ the court upheld the expulsion of a union member for seeking to

277. Chafee, *supra* note 226, at 1017-18.

278. 270 Pa. 67, 113 Atl. 70 (1921).

279. 111 Kan. 415, 207 Pac. 829 (1922).

persuade the railroad to modify a seniority agreement formulated by the union's bargaining committee.²⁸⁰

An intermediate situation was presented in *DeMille v. American Association of Radio Artists*,²⁸¹ where an association by-law authorized the use of association funds to support legislative proposals and provided for a special assessment. The plaintiff objected to the use of his funds to support a particular proposal and refused to pay the assessment. For this he was expelled. In his action to obtain reinstatement the court upheld the validity of the rule and denied relief. It found that the association was a distinct entity and that the member was free to personally oppose the proposition. While to some extent his right is violated because his money is used to support something he opposes, nonetheless, unlike the situation in *Spayd*, he does remain free to express his views. A contrary result would render a program of lobbying difficult, since members could refuse to pay dues and assessments if they disagreed with the union's position. The holding, therefore, is sound; and the result is necessary if the association is to carry out such a program.

In *Stein v. Marks*,²⁸² the court held unenforceable a requirement of a literary society, subsequently adopted, that all members belong to a certain political party. It concluded that this bore no relationship to the purpose for which the organization was created, and thus was an unreasonable interference with the political rights of the members.²⁸³

A very interesting case is *Bernstein v. Alameda-Contra Costa Medical Association*,²⁸⁴ where two grounds for expulsion were alleged. In one situation the physician was hired by an attorney to prepare a pathological report of an autopsy done upon a killed worker. The report was intended to be and was, turned over to the industrial accident commission, which was deciding whether death occurred in the course of employment. In making the report the physician referred to the fact that the doctor who had done the autopsy was not a "qualified pathologist." In fact that doctor was not certified, though he had practiced extensively in the field. A by-law prohibited a member from giving testimony before a court or judicial body that should disparage another physician, and the plaintiff was expelled for violation of that by-law. The court held that the by-law could not be enforced. It observed that reports in judicial proceedings are absolutely privileged and that the by-law could have an inhibiting effect on the accuracy of the judicial proceedings. Consequently, its

280. *Spayd* was distinguished on the ground that there was no question of petitioning a public official. The court said the issue was simply whether it was against public policy for members of a union to agree to bargain collectively rather than individually.

281. 31 Cal. 2d 137, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948).

282. 44 Misc. 140, 89 N.Y.S. 921 (1904).

283. See also *Gallagher v. American Legion*, 154 Misc. 81, 277 N.Y.S. 81, *aff'd*, 242 App. Div. 604, 271 N.Y.S. 1012 (1934).

284. *Supra* note 224.

enforcement would be against the public interest.²⁸⁵ Of similar vein is *Thompson v. Grant Int'l Brotherhood of Locomotive Engineers*,²⁸⁶ holding that members of a railroad union could not be expelled for testifying as expert witnesses in a lawsuit against a railroad.

The other ground assigned for expulsion was that he said within the hearing of another doctor's patient that the doctor should not have ordered a Caesarian section performed on her. He was found to be aware of her presence. The court held expulsion on this ground was proper. The woman was not his patient, and such conduct is detrimental to the profession. Hence the requirement as applied here was reasonable, and expulsion was upheld. The cases in this area have been soundly decided, and the courts have not improperly intruded into the right of an association to set proper standards for membership.

As to the associational relationship—the right to belong—we must distinguish between protection of economic interests and social and intangible interests in such relationships. Both should be protected irrespective of any question of "property rights." The courts have wisely limited their review to procedural fairness and to substantive grounds that involve substantial rights of the members, the exercise of which does not violate the purpose for which the association was organized nor interfere with its effective operation. What is needed is the full recognition that the interest in associational relationships is to be protected without regard to the fiction of a "property right."

CIVIL RIGHTS

This section involves what may be called the "miscellaneous" of personal interests. The term, "civil rights" is used in a variety of contexts. We say that a convict loses "civil rights," such as the right to vote. Legislation designed to prevent racial discrimination against the Negroes and other minority groups is termed "civil rights" legislation. Professor deFuniak has defined civil rights as "those rights one enjoys as regards other individuals rather than those in relation to the establishment and administration of the government, the latter being political rights."²⁸⁷ This definition is much too broad to be

285. The court observed as follows:

The policy of making such statements privileged is obvious. If parties and witnesses were subject to slander and libel actions for utterances made or filed in a judicial proceeding the administration of justice would be hampered and the judicial process throttled. The same policy should ban a medical association by-law which holds over each of the members the threat of expulsion if in his testimony (oral or written) before a court or other judicial body he "disparages by comment or insinuation," another physician. With such a threat ever facing him, he must weigh carefully and well his every utterance lest through some slip of the tongue he "insinuate" something about another physician which his county medical council may, perchance, deem "disparaging" and, as such, just cause for censure, suspension or expulsion. It is inconceivable that the law could tolerate the holding of such a sword of Damocles over every medical witness in any judicial proceeding. 293 P.2d at 865.

286. 41 Tex. Civ. App. 176, 91 S.W. 834 (1905). This was an action to recover damages for the wrongful expulsion.

287. de Funiak, *supra* note 11, at 22.

useful. Nor does it help to call them rights other than property or contractual that one enjoys; we have previously discussed other personal rights that are recognized. I think that the best way to define a civil right is in terms of a right to carry on legitimate activities without improper interference, either private or governmental,²⁸⁸ and with the degree of dignity usually associated with membership in a free society. If this sounds too general, the answer is admittedly so; but at least it points out the direction in which we are looking. Basically the cases can be put into two categories: non-discrimination and interference with expression. We are not now concerned with "political rights," that is rights involving the electoral process such as the right to vote or hold office.

Non-discrimination

In the absence of statute private individuals can discriminate in the operation of their activities, even though they may open the use of such activities to the general public. So long as the government is not involved, no constitutional question is presented, and at common law there is the right to discriminate.²⁸⁹ We are not now concerned with the "common callings." But in some states and localities discrimination is prohibited in the operation of activities open to the public such as parks, swimming pools, theaters, restaurants and the like. The issue is whether injunctive relief is available to secure admission.

It has been said that the very nature of a "civil right" makes damages and other remedies inadequate,²⁹⁰ and that an injunction is the most efficacious remedy because of its "unique flexibility" and its capacity for eliminating the risks inherent in the defendant's acting first and defending a prosecution later.²⁹¹ Both observations are correct. Where dignity—an intense personal interest—is involved, damages can never be adequate. Criminal prosecution is never an adequate remedy, since it generally cannot be initiated by the injured individual and, in any event, cannot guarantee enjoyment of the right created. An injunction insures enjoyment in the future, and if the suit is maintained as a class action, guarantees that the facility will be operated on a non-discriminatory basis.

Research has disclosed only three cases involving the issue of the availability of an injunction against discrimination in the operation of facilities open to the public. In *Orloff v. Los Angeles Turf Club*,²⁹² statute required that all operators of public accommodations had to admit any person over twenty-one who paid the admission price

288. See the discussion, *supra* notes 19-23 and accompanying text.

289. Civil Rights Cases, 109 U.S. 3 (1883). In 1964 Congress enacted the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. 1971 (1964), which prohibits discrimination in public accommodations where interstate commerce is affected or where such discrimination is supported by state action. Under section 204(a) injunctive relief is expressly authorized.

290. *de Funiak*, *supra* note 11, at 22.

291. *Moscovitz*, *supra* note 11, at 144-45.

292. *Supra* note 25.

except for certain standard reasons such as drunkenness or disorderly conduct. The plaintiff was refused admission to a race track and sought an injunction. The statute provided that any person wrongfully ejected or refused admittance could recover damages of at least \$100 in addition to any actual damages. The defendant argued that the statutory remedy was exclusive, since the statute created a right unknown to the common law. The court held that the rule of strict construction was inapplicable, as it did not form a part of the California Civil Code. The court emphasized that actual damages would be "extremely difficult if not impossible" to prove and that \$100 was an insignificant recovery. It concluded that:

The positive declaration of the personal right and the importance of its preservation together with the inadequacy of the remedy by way of damages and the \$100 penalty furnish sufficient reason for injunctive relief.²⁹³

The same result was reached in *Everett v. Harron*.²⁹⁴ Statute provided that all persons were entitled to equal enjoyment of public accommodations, and provided criminal penalties for violation. The plaintiff had been refused admittance to the defendant's swimming pool and sought injunctive relief. The court held the injunction should be granted. Since the statute created a "right," it also was intended to create a remedy, which for an excluded individual meant a civil remedy.²⁹⁵ It observed that where a statute created a specific duty for the benefit of the public, violation of the statute was deemed to create an action for damages. But since damages would not be adequate because of the very nature of the interest and since there would have to be a multiplicity of suits, injunctive relief was proper.

However, in *Fletcher v. Coney Island, Inc.*,²⁹⁶ the court held that an individual refused admission to a public park because of her race could not obtain injunctive relief. The statute provided criminal liability and also civil liability, authorizing recovery of between \$50 and \$500 damages. The court held that the legislature intended to bar injunctive relief, since it did not expressly authorize it. It emphasized that since the statute created rights unknown to the common law, it should be strictly construed.

It is difficult to see how a statute prohibiting certain conduct evidences a legislative intent to benefit the wrongdoer by depriving the courts of what they—charged with enforcement of the statute—deem the most efficient remedy to eliminate an evil the legislature found existed. It can be contended with equal cogency that the provision for damages was intended to insure that the plaintiff recovered some money, but not too much. The legislature may have realized that

293. 180 P.2d at 325.

294. *Supra* note 27.

295. The statute also referred to "presumptive evidence in any criminal or civil proceeding," a point relied upon by the court.

296. 165 Ohio St. 150, 134 N.E.2d 371 (1956).

damages are completely speculative, and wanted to insure some recovery. At the same time it did not feel that the injury is such that heavy damages should be awarded. Whether injunctive relief is available then becomes a matter of statutory construction. Since the legislature was intending to benefit people denied equal accommodations, and since an injunction is the more efficacious remedy, it is submitted that injunctive relief should be granted unless specifically prohibited by the legislature. These statutes are becoming more numerous, as the struggle for equality becomes more pronounced. The legislature can prevent such disputes by specifically authorizing injunctive relief. If it has not, then it is submitted that the results in *Orloff* and *Harron* are more in keeping with the probable legislative intent, and injunctive relief should be granted.

Expression

One situation in this area arises out of the desire to protect the rest of the public from reading or seeing things that, for one reason or another, are deemed deleterious. And, of course, individuals have a right to advise other members of the public that they should not read or see certain things. This is part of their right to free expression and must be protected. If A publishes a book that B considers undesirable, he must be free to advise C not to read it. If B does not like a movie that A is showing at this theater, he certainly has the right to advise people, by signs or otherwise, that the movie will corrupt their morals. If this results in A's losing patronage, then this is a risk he must bear as the price of free discussion in an open society. He must convince the public that the movie is desirable. Equally clear is the fact that B may not physically prevent people from entering A's theater or destroy the printing presses on which A prints his book. In other words, he may compete in the marketplace of ideas, but may not resort to improper means to prevent A from expressing his ideas.

The question is whether he may use the threat of criminal prosecution against third parties to prevent them from distributing A's material. In *American Mercury v. Chase*,²⁹⁷ the Watch and Ward Society, of which the defendant was secretary, scrutinized books and magazines to determine if they were "objectionable." Once a publication was found to "offend" it might be expected that the defendants would seek criminal prosecution or would attempt to persuade the public not to read the publication or distributors not to handle it. Instead it advised distributors that if they did not remove the offending publication, criminal prosecutions would be instigated *against the distributor*. In an action by a publisher to enjoin such action, the court found such conduct improper. As a practical matter, it found that the *threat* of prosecution would be sufficient to deter the dealers from handling the publication. Rather than risk criminal prosecu-

297. 13 F.2d 224 (D. Mass. 1926).

tions most dealers would simply refuse to handle the work. The court analogized the situation to an illegal secondary boycott. The defendant had a right to institute criminal prosecution; it had a right to express its views as to the propriety or legality of a publication. But it did not have the right to rely on *in terrorem* tactics which did not reach the merits of the publications. Obviously it was relying on the threat of suit to prevent the dissemination of material it deemed objectionable. This was considered to be unfair means and was enjoined. So too, if a defendant picketed a theater in an attempt to compel the theater owner to cease showing an objectionable film, this would be within his rights. But if he continued picketing when other films not objectionable were being shown or otherwise attempted to cause a boycott unless the theater operator would show only those films of which he approved, this would clearly be improper. The law will not recognize unofficial censorship when accompanied by means other than fair persuasion with respect to the offending publication.²⁹⁸

Another case involving expression is *Schwartz v. Edrington*,²⁹⁹ where the plaintiff asserted a right to keep silent.³⁰⁰ He was tricked into signing the defendant's petition for office and sought to enjoin the defendant from publishing the petition with his signature in a newspaper. The court granted the injunction, observing that the defendant was not being denied the right to publish his sentiments as guaranteed by the state constitution, but could not publish the sentiments of the plaintiff against his will.³⁰¹ Of similar import is *Local 309 v. Gates*,³⁰² where the court enjoined state policemen from attending the meetings of a labor union out on strike, concluding that such attendance inhibited free discussion at the meetings, as it was no doubt intended to do.

These cases demonstrate the availability of injunctive relief to protect "civil rights." As discussed previously, damages are necessarily inadequate and injunctive relief is proper. With the abandonment of the personal-property right distinction, injunctive protection of many interests relating to human dignity and enjoyment can be assured.

CONCLUSION

The concept that "equity protects only property rights" has been another injury to the administration of justice that has resulted from

298. The Supreme Court has recently held that a state statute authorizing public officials to advise distributors that publications were obscene and requesting them to remove such publications was an unconstitutional abridgement of free expression. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Other courts have enjoined such action taken without statutory authorization. See, e.g., *New American Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953).

299. 133 La. 235, 62 So. 660 (1913).

300. The right to keep silent forms part of the first amendment's guarantee. See, e.g., *Board of Education v. Barnette*, 319 U.S. 624 (1943).

301. Compare *Somerville v. Horsley*, 195 Misc. 961, 91 N.Y.S.2d 605 (1949), where the injunction against the use of the plaintiff's name as a supporter was refused, since the defendant had agreed to cease such use and the plaintiff's repudiation had received extensive publicity.

302. 75 F. Supp. 620 (N.D. Ind. 1948).

the historical concept of "law and equity" as separate systems of law. Today it is recognized that injunctive relief is available to protect all substantial interests, and the court need not struggle to find a technical "property right." Because of the intensity of feeling generated by personal rights, damages will usually not be adequate. The issue then becomes one of practicability. The very intenseness of personal interests which makes damages inadequate for their enforcement may make it equally impracticable to attempt such enforcement. There are limits on the power of courts to regulate the intimate personal relationships between human beings. The courts should recognize this limitation on their power and be wary lest they issue decrees that are unenforcible or impose too great a strain on personal liberty. However, when the interest of a plaintiff is found to be substantial, when the conduct of the defendant is found to be wrongful, and when no public interest or question of practicability militates against the granting of relief, the process of injunction should be employed to give full protection to those rights which in the final analysis, are often those that make life worth living.